Supreme Court, U.S.
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No. 10-168

IN THE

Supreme Court of the United States

LIFE SETTLEMENT CORPORATION
d/b/a PEACHTREE LIFE SETTLEMENTS,

Petitioner,

v.

GOSHAWK DEDICATED LIMITED AND KITE DEDICATED LIMITED F/K/A GOSHAWK DEDICATED (NO. 2), AS MEMBERS OF SYNDICATE 102 AT LLOYD'S,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Who determines whether an arbitration agreement is valid and enforceable when, as a result of *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), a party has been deprived of its right to judicial review for errors of law under a contractual provision without which that party would not have assented to arbitration, the courts or the arbitrators?

2. Who decides, in light of Sections 2 and 4 of the Federal Arbitration Act, if a party has failed to comply with an obligation that the parties agreed was a condition precedent to arbitration, the courts or the arbitrators?

PARTIES TO THE PROCEEDING

Petitioner, who was the appellant below, is Life Settlement Corporation d/b/a Peachtree Life Settlements.

Respondents, who were the appellees below, are Goshawk Dedicated Limited and Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2), as Members of Syndicate 102 at Lloyd's.

Life Settlement Corporation is wholly owned by Peach Holdings, LLC, which in turn is wholly owned by Peach Holdings, Inc., which in turn is wholly owned by Orchard Acquisition Company, which in turn is wholly owned by Peach Group Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Life Settlement Corporation d/b/a Peachtree Life Settlements (Peachtree) respectfully requests the Court to grant its Petition for a Writ of Certiorari to review the decision of the New York Court of Appeals.

OPINIONS BELOW

The Memorandum Decision of the New York Court of Appeals, issued on May 4, 2010, appears at Appendix ("App.") A to this Petition at 1a to 2a and is reported at *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 14 N.Y.3d 850, __ N.E.2d __, __ N.Y.S.2d __ (N.Y. May 4, 2010). The New York Court of Appeals' denial of reargument, which is unpublished, appears at App. E at 29a to 30a.

The October 13, 2009 order of the New York Supreme Court, Appellate Division, First Department, affirming the trial court's denial of a stay of arbitration, appears at App. B at 3a to 16a and is reported at *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 888 N.Y.S.2d 458 (N.Y.A.D. 1st Dept. 2009). The Appellate Division's December 22, 2009 order granting Peachtree leave to appeal is unpublished and appears at App. C at 17a to 18a. The September 30, 2008 order of the New York Supreme Court, County of New York, Commercial Division appears at App. D at 19a to 28a and is reported in *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 2008 WL 4461446, 2008 N.Y. Slip Op. 32626(U) (N.Y. Sup. Sept. 30, 2008).

JURISDICTION

The New York Court of Appeals affirmed the Supreme Court of New York, Appellate Division, First Department's order denying a request to stay arbitration on May 4, 2010, App. A. On July 1, 2010, the Court of Appeals denied Peachtree's request for reargument. App. E. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

App. F at 31a.

[1] Although the New York Court of Appeals' decision contemplates further proceedings, this Court has jurisdiction to review the court's judgment. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-85 (1975).

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides in pertinent part:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

App. F at 32a-33a.

STATEMENT OF THE CASE

A. THE CCI CONTRACTS

This case concerns a request to enjoin certain arbitrations, involving disputes relating to four contingency cost insurance policies (the "CCI Contracts"). Respondents Goshawk Dedicated Limited and Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2), as Members of Syndicate 102 at Lloyd's (collectively, "Lloyd's"),[2] submitted the disputes to

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[2] In the complaint, Lloyd's was originally named "Goshawk Syndicate 102 at Lloyd's." Recently, the New York Supreme Court amended the caption to reflect Lloyd's name as "Goshawk Dedicated Limited and Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2), as Members of Syndicate 102 at Lloyd's."

arbitration, pursuant to an arbitration provision included in the CCI Contracts. (A-333)[3] Under the CCI Contracts, Life Receivables Trust ("LRT"), the original plaintiff in the underlying state-court proceedings,[4] is the assured, Lloyd's is the insurance underwriter, and Peachtree is the originator and servicer of the life insurance policies covered by the CCI Contracts. (A-377, 407-487)

The CCI Contracts contains one (and only one) arbitration provision,[5] which submits "all disputes and differences arising under or in connection with [the CCI

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[3] The briefs and letters filed before the Court of Appeals and the briefs filed before the Appellate Division make reference to the documents included in the joint appendix that the parties submitted with the Appellate Division, as "A-__." To be consistent, this brief includes the same designations that were used below.

[4] LRT was the original plaintiff in the underlying state case and one of two appellants in the appeal filed before the Appellate Division. LRT, however, did not appeal to the Court of Appeals. Shortly after Peachtree appealed before the Court of Appeals, LRT and Lloyd's entered into a settlement agreement, as a result of which LRT was removed as a party to this action. The case now continues between Peachtree and Lloyd's *sub nom Life Settlement Corporation v. Goshawk Dedicated Limited and Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2), as Members of Syndicate 102 at Lloyd's.*

[5] In another section of the CCI Contracts, the parties are instructed to refer claims in dispute to arbitration. Under that section, claims must be resolved pursuant to the arbitration provision that is the subject matter of this petition. (A-382, 411, 456, and 492) That section also imposes a condition precedent to arbitration, as discussed in more detail below. *Id.*

Contracts] to arbitration under the American Arbitration Association Rules." (A-399, 428, 473, 509) The parties further agreed that "[t]he Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute," conditioned on the parties retaining "the right to appeal errors of law to a court of law." (A-399, 428, 473, 509) Importantly, nowhere in the CCI Contracts do the parties include a provision submitting to arbitration disputes regarding the determination of the validity or enforceability of the agreement to arbitrate.

As shown by the following language, Lloyd's "sole and exclusive remedy" under the CCI Contracts is to seek indemnification against Peachtree *after (and only after)* Lloyd's has paid a claim to LRT:

> *Sole Remedy.* Paragraph 3 of this section sets forth the *sole and exclusive remedy* of [Lloyd's] for losses arising out of, in relation to or in connection with any and all (i) breaches of or inaccuracies in any representations, warranties, certifications or statements made by [LRT], [Peachtree] or the Back-Up Servicer or their respective affiliates or their respective directors, members, agents, employees or representatives in this Insurance or in any Coverage Certification, monthly *bordereaux*, Claim Certification or other notice, certificate, report or other document delivered pursuant to or in connection with this Insurance, (ii) instances of fraud or misrepresentation committed by

> [LRT], [Peachtree] or the Back-Up Servicer or their respective affiliates or their respective directors, members, agents, employees or representatives in connection with this Insurance, (iii) breaches of any covenants or agreements of [LRT], [Peachtree], the Back-Up Servicer or any other person or entity in this Insurance or the Servicing Agreement or any other agreement or instrument or of any legal requirement, or (iv) any other matter covered in paragraph 2 of this section.

(A-394, 423, 468 and 504) (Emphasis added.)

The mentioned paragraph 3—establishing Lloyd's "sole and exclusive remedy" under the CCI Contracts—states that:

> [Peachtree] agree[s] to indemnify [Lloyd's] against losses in respect of any Qualified Life Insurance Policy *as to which [Lloyd's] make[s] payment* to the extent such losses result from the breach by [Peachtree] of specified representations, warranties, covenants or provisions herein that materially and adversely affect the amounts realized as proceeds of the Qualified Life Insurance Policy.

(A-393, 422, 467 and 503) (Emphasis added.)

Significantly, Lloyd's agreed "that *under no circumstances* . . . shall [Lloyd's] be entitled *to submit any dispute* as to [Lloyd's] obligation to pay a Claim

under [the CCI Contracts] to arbitration *prior to payment of such Claim.*" (A-382, 411, 456, and 492) (Emphasis added.)[6]

B. LLOYD'S FAILS TO COMPLY WITH THE CONDITION PRECEDENT TO ARBITRATION

Even though the parties limited the disputes that Lloyd's could arbitrate and expressly agreed "that *under no circumstances*" Lloyd's could arbitrate those disputes unless Lloyd's first paid a claim to LRT, Lloyd's failed to pay any claim under the CCI Contracts. (A-375 ¶ 24) By doing so, Lloyd's failed to satisfy a condition precedent to arbitration under the CCI Contracts, in essence forcing arbitration to which the parties categorically did not agree.

C. PEACHTREE CHALLENGES THE VALIDITY AND ENFORCEABILITY OF THE ARBITRATION PROVISION

Peachtree claims that the arbitration provision in the CCI Contracts was rendered invalid and unenforceable as a matter of law, in light of this Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), which holds that the Federal Arbitration Act (FAA) prohibits parties to expand by agreement the scope of judicial review beyond that authorized by the FAA.[7] Specifically, Peachtree argues

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[6] There are some exceptions to that provision, none of which are pertinent to these proceedings. (A-382, 411, 456, and 492)

[7] *See, e.g.*, appellate brief filed by Peachtree before the Appellate Division, at pp. 19-29, reply brief filed by Peachtree before the same court, at pp. 14-26. It is noteworthy that, (Cont'd)

that, because in the arbitration agreement the parties expanded the scope of review beyond the grounds enumerated in the FAA, and because that standard-of-review provision cannot be severed from the rest of the arbitration provision as a matter of state law, the arbitration agreement is not valid. *Id.*[8]

On April 24, 2008, LRT moved to enjoin the pending arbitration proceedings to which LRT was a party. Peachtree filed a response on May 21, 2008, also requesting a stay of the arbitrations. In a supporting affidavit, Peachtree's Chief Executive Officer attested that Peachtree had initially rejected a proposed arbitration clause *because that clause did not provide for the right to judicial review of legal errors in an arbitral decision.* Peachtree's Chief Executive Officer also declared that, *but for the ultimate inclusion of the judicial review provision, Peachtree would not have agreed to arbitration.* (A-565-6) No one with knowledge refuted that declaration, which remained undisputed in the record. (A-757-8)

The trial court issued an order on September 19, 2008, denying the request to enjoin the arbitrations. (App. D) The court ruled that the validity and enforceability of the arbitration agreement are for the

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(Cont'd)
pursuant to Rule 500.11 of the Rules of Practice of the New York Court of Appeals, Peachtree's appeal to that court was decided on the submissions made with the Appellate Division. (App. A, at 2a)

[8] Among other things, Peachtree also argued that Lloyd's had failed to comply with a condition precedent to arbitration.

arbitrators to decide, because the CCI Contracts provide that disputes arising out from contracts are to be referred to arbitration under the AAA Rules—under which rules arbitrators have the power to determine "the existence, scope or validity" of arbitration agreements. (App. D, at 24a) Relying on *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205 (2d Cir. 2005), the court concluded that "[w]here, as here, the parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, that incorporation constitutes clear and unmistakable evidence that arbitrability is to be decided by the arbitrators." (App. D, at 24a)

Relying on *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 403-04 (1967), and *Cap Gemini Ernst & Young, US, LLC v. Nackel*, 346 F.3d 360, 365 (2d Cir. 2003), Peachtree appealed the trial court's order, reiterating that the threshold questions of the arbitration agreement's validity and enforceability is for the court, not the arbitrators, to decide. *See* Peachtree's Appellate Brief and Peachtree's Motion for Reargument or for Leave to Appeal.[9] On October 30, 2008, the

[9] In its briefs below, Peachtree argued how the courts confused the question of the validity of the arbitration agreement with the issue of arbitrability. *See, e.g.*, motion for reargument filed before the Appellate Division, at pp. 12-13; and motion for reargument filed before the Court of Appeals, at pp. 5-12. As noted by Peachtree below, in *Cap Gemini*, the Second Circuit makes an unequivocal distinction between the questions of validity and arbitrability as follows:

> It may well be true. . . that 'the plain language of the arbitration clause at issue . . . evidences a clear and unmistakable intent to refer the issue of

(Cont'd)

Appellate Division First Department granted a stay of the arbitration proceedings pending resolution of the appeal.

(Cont'd)

> arbitrability to the arbitrators.' However, before proceeding to determine the scope of the arbitration agreement, the court must first confirm that the agreement is valid and enforceable.

346 F.3d at 366. Peachtree also cited to *Nichols v. Washington Mut. Bank*, 2007 U.S. Dist. LEXIS 85936, at *19-20 (E.D.N.Y. Nov. 21, 2007), where the Eastern District of New York court held that "[w]hen a party challenges . . . the existence or validity of the arbitration clause itself, courts must determine whether the arbitration clause itself exists, and whether it is valid." *Id.* at 23 (emphasis added). Rejecting that the case involved the issue of arbitrability (as in *Contec*), the court further explained:

> [T]he particular challenges Nichols makes must be decided by a court. When a party challenges not the validity of the entire contract, see *Prima Paint* . . . (noting that challenges to the validity of a[n entire] contract are for the arbitrator), or the application of a valid arbitration clause to the particular dispute at issue, but rather the existence or validity of the arbitration clause itself, courts must determine whether the arbitration clause itself exists, and whether it is valid. *Cap Gemini* [346 F.3d at 366] (noting that inquiry into enforceability of arbitration clause preceded question of whether that clause could refer the issue of arbitrability to the arbitrators). Nichols's challenges are to the existence and validity of the arbitration clause, and so [the court] must decide them.

2007 U.S. Dist. LEXIS 85936, at *22-23.

The Appellate Division affirmed the trial court's order on October 13, 2009, with one justice especially concurring. (App. B) The majority held that "the scope and validity of the arbitration agreement, necessarily including issues of arbitrability, are for the arbitration tribunal to determine." (App. B, at 4a). Although acknowledging, in light of *Hall Street*, that the parties' agreement to subject the arbitrators' decisions to judicial review for legal errors could not be enforced, the court declined to hear the parties in order to determine whether the standard of review provision could be severed to avoid invalidating the entire arbitration agreement, ruling as follows: "that issue is necessarily included among the arbitrability issues that the parties' agreement reflects would be decided by the arbitrators." (App. B, at 5a)

On December 22, 2009, the Appellate Division granted leave to appeal. (App. C, at 17a-18a) The New York Court of Appeals affirmed the Appellate Division's order on May 4, 2010. (App. A)

Although the Court of Appeals recognized that, under *Hall Street*, parties are prohibited "from expanding, by their own agreement, the scope of judicial review beyond that authorized by the [FAA]," the court held that "clear and unmistakable evidence exists in this case that the parties agreed to arbitrate questions of arbitrability, including whether the parties' arbitration agreement is invalid under *Hall St. Assoc.* or whether the apparently offending provision could be severed from the remainder of the agreement." (App. A, at 2a)

Peachtree moved for reargument, asserting that the Court of Appeals had overlooked this Court's controlling precedent in *Prima Paint* in holding that the question of the arbitration agreement's validity and enforceability should be decided by the arbitrators in the first instance. Peachtree thereafter submitted this Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, __ S.Ct. __, 2010 WL 2471058 (June 21, 2010), as supplemental authority. The Court of Appeals denied the reargument motion on July 1, 2010. (App. E, at 29a-30a)

None of the courts below addressed Peachtree's challenge to the enforceability of the arbitration provision in light of Lloyd's failure to comply with a condition precedent to arbitration.[10]

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[10] In a concurring opinion of the Appellate Division, Justice McGuire did address the challenge, noting that although *it appeared that Lloyd's had not complied with the condition precedent*, that was a "question regarding arbitrability that . . . must be decided by the arbitrators." (App. B, at 16a)

REASONS FOR GRANTING THE PETITION

REVIEW IS WARRANTED BECAUSE THE NEW YORK COURT OF APPEALS' DECISION ESTABLISHES PRECEDENT THAT CONFLICTS WITH THIS COURT'S DECISIONS AND MISINTERPRETS FEDERAL LAW.

A. SUBSTANTIVE FEDERAL ARBITRATION LAW

1. ARBITRATION IS A MATTER OF CONTRACT

Section 2 of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added). This Court recently held that this section, which is "the primary substantive provision" of the act, "requires courts to enforce [written provisions to settle by arbitration] according

to their terms." *Rent-A-Center*, 2010 WL 2471058, at *3-4. "Like other contracts, however, [these provisions] may be invalidated by 'generally applicable contract defenses.'" *Id.* at *4.

While this Court has recognized a pro-arbitration presumption under the FAA, it has only applied it

> where it reflects, and derives its legitimacy from, a *judicial conclusion* that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was *validly formed* and (absent a provision *clearly* and *validly* committing such issues to an arbitrator) is *legally enforceable* and best construed to encompass the dispute.

Granite Rock Co. v. Int'l Brotherhood of Teamsters, __ S. Ct. __, 2010 WL 2518518, *9 (June 24, 2010) (citations omitted; emphasis added).

Thus, although "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), the FAA's pro-arbitration policy must yield to the parties' contractual rights and expectations. *See e.g.*, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1773-74 (2010); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

2. UNDER THE FAA, IT IS FOR THE COURTS TO DETERMINE WHETHER AN ARBITRATION AGREEMENT IS VALID

As per the preceding section, the fundamental principle that underpins the FAA and this Court's precedents is that arbitration is a matter of contract and that parties can *only* be forced to arbitrate disputes they *validly* agreed to arbitrate.

Consistent with this principle, Section 4 of the FAA provides that "[t]he court *shall hear* the parties, *and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added). The section further provides that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same *be in issue*, the court *shall proceed summarily to the trial thereof*." *Id.* (emphasis added).

In light of the clear and unambiguous language of the FAA, this Court has reiterated that it is *for the courts* to decide the question of the validity of an arbitration agreement. In *Rent-A-Center*, for example, the Court stated that

> [i]f a party challenges the validity under § 2 [of the FAA] of the precise agreement to arbitrate at issue, the federal court *must* consider the challenge before ordering compliance with that agreement under § 4 [of

> the FAA] . . . *'To immunize an arbitration agreement from judicial challenge . . . would be to elevate it over other forms of contract.*

2010 WL 2471058, at *7 (emphasis added); *accord, e.g., Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 403-04 (1967) (courts may compel arbitration under Section 4 of the FAA only when satisfied that the making of the agreement to arbitrate is not at issue).

As recognized further by the Court in *Granite Rock*:

> our precedents hold that courts should order arbitration of a dispute *only where the court* is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a *valid* provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. *Where a party contests either or both matters, "the court" must resolve the disagreement.*

2010 WL 2518518, *9 (emphasis added).

B. PEACHTREE HAS CHALLENGED THE VALIDITY AND ENFORCEABILITY OF THE ARBITRATION PROVISION CONTAINED IN THE CCI CONTRACTS

As stated previously, the CCI Contracts contain one (and only one) arbitration provision, which submits to arbitration under the AAA Rules "[a]ll disputes and differences arising under or in connection with" the CCI Contracts. The parties agreed that the arbitrators have

the power to rule and reach a final determination in any such arbitration "*provided that* the parties shall each retain the right to appeal errors of law to a court of law." (A-399, 428, 473, 509) (Emphasis added.) Nowhere in the CCI Contracts do the parties include any other arbitration provision delegating to the arbitrators any other disputes, including those relating to the question of the validity or enforceability of the agreement to arbitrate. *Id.*; *see also generally* A-377-406, 407-451, 452-486, 487-560.

Peachtree has raised before the courts of New York that, because there is no possibility of judicial review of the arbitrators' errors of law post-*Hall Street* and because the clause providing for such review cannot be severed from the arbitration agreement as a matter of law, the parties' arbitration agreement has been rendered invalid and unenforceable.[11] Simply put, Peachtree has challenged the validity and enforceability of the arbitration provision in the CCI Contracts. *See Rent-A-Center*, 2010 WL 2471058, *4 n.1, *8.[12]

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[11] *See supra* note 7 and accompanying text.

[12] Peachtree raises an argument which is similar to one that was made in *Rent-A-Center*. In *Rent-A-Center*, the petitioner argued (albeit belatedly) that the provision delegating certain disputes to the arbitrator was

> substantively unconscionable because the quid pro quo he was supposed to receive for it—that "in exchange for initially allowing an arbitrator to decide certain gateway questions," he would receive "plenary post-arbitration judicial review"—was eliminated by the Court's subsequent holding in Hall Street[], that the nonplenary grounds for judicial review in §10 of the FAA are exclusive.

(Cont'd)

As such, under the clear mandate of the FAA, Peachtree cannot be forced to arbitrate unless and until a court has determined whether the arbitration provision is in fact valid and enforceable. *See id.* at *7.

C. THE DECISION OF THE NEW YORK COURT OF APPEALS IS CONTRARY TO THE FAA AND THIS COURT'S PRECEDENTS

1. THE COURT OF APPEALS' DECISION

Despite the unambiguous language of the FAA and this Court's clear precedents, the trial court in New York refused to address Peachtree's challenge to the validity

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(Cont'd)

Rent-A-Center, 2010 WL 2471058, *7, 8 & n. 5. However, the Court did not decide this question in that case because the petitioner had not raised it in the court below. The Court now has the opportunity to answer this question, as Peachtree timely raised it below.

The Court should also consider the fact that in *Hall Street* it also left undecided whether the judicial review provision that the Court held therein to be unenforceable is severable from the rest of the arbitration agreement. In footnote 6 of the opinion, the Court noted that the petitioner was suggesting that the agreement predicated entry of judgment on adherence to the judicial-review standard; *i.e.*, that because the judicial review provision at issue there could not be severed, the district court had no authority to confirm the arbitration award without conducting judicial review. However, the Court did not address the merits of that argument, noting that the petitioner had not sought certiorari review of the Ninth Circuit's severability analysis. 552 U.S. at 587. Peachtree has argued in this case that the judicial review proviso is not severable, but the courts below have refused to address that issue.

of the arbitration provision at issue, holding that the matter is for the arbitrators to decide. The New York Court of Appeals agreed.

While recognizing that the parties' agreed-upon standard of review cannot survive *Hall Street*, the New York Court of Appeals held that the threshold question of the arbitration agreement's *validity* is nonetheless for the arbitrators to decide, based on what it understood to be "clear and unmistakable evidence ... that the parties agreed to arbitrate questions of *arbitrability*, including whether the parties' arbitration agreement is invalid under *Hall St. Assoc.* or whether the apparently offending provisions could be severed from the remainder of the agreement." (App. A, at 2a)

2. BECAUSE PEACHTREE HAS CHALLENGED THE VALIDITY AND ENFORCEABILITY OF THE PARTICULAR ARBITRATION PROVISION AT ISSUE, IT IS FOR THE COURTS TO DECIDE THAT THRESHOLD QUESTION

Here, Peachtree has challenged the validity of the one and only provision in the CCI Contracts which submits to arbitration under the AAA Rules "all disputes" arising under or relating to the CCI Contracts. Thus, not only has Peachtree challenged the only provision that submits every single dispute to arbitration, but Peachtree has challenged the validity and enforceability of the particular provision that submits the resolution of disputes under the AAA Rules. As such, the FAA and this Court's precedents command *judicial determination* of Peachtree's challenge,

something the New York Court of Appeals simply overlooked. *See Rent-A-Center*, 2010 WL 2471058, at *7; *Prima Paint*, 388 U.S. at 403-04.

3. THE PARTIES DID NOT COMMIT THE THRESHOLD QUESTION OF VALIDITY AND ENFORCEABILITY TO ARBITRATION

The same conclusion would be reached even if Peachtree is not considered to have challenged the particular arbitration provision at issue (which it did) because, contrary to what Lloyd's suggested before the New York Court of Appeals, the parties did not commit to arbitration the threshold question of the validity and enforceability of the agreement to arbitrate. As noted above, there is absolutely no provision in the CCI Contracts submitting to arbitration the threshold questions. The CCI Contracts do not contain anything even remotely similar to the so-called "delegation provision" in *Rent-A-Center*, where the parties expressly agreed to submit to arbitration "disputes relating to the . . . enforceability . . . of this Agreement including . . . any claim that all or part of this Agreement is void or voidable." 2010 WL 2471058, at *4.[13]

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[13] Indeed, the arbitration provision in the CCI Contracts is almost identical to the one that was at issue in *Prima Paint*, where the parties submitted to arbitration "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association." *Prima Paint*, 388 U.S. at 398. The Court held therein that where parties challenge the arbitration provision, Section 4 of the FAA compelled the courts

(Cont'd)

Furthermore, the AAA Rules do not commit the resolution of the threshold questions to the arbitrators. To be sure, the AAA rule to which the Court of Appeals referred does not state that the arbitrators "shall rule" on the threshold question, but simply that the arbitrators have "the power to rule" on such questions. AAA Rule 7(a). Before the arbitrators can act upon such authority, however, a court must first determine whether (i) the parties committed that particular dispute to arbitration and, of course, (ii) whether such agreement was valid *and* is legally enforceable. *Granite Rock*, 2010 WL 2518518, *10 (Court will only compel arbitration of a dispute only after the Court is "persuaded that [1.] the parties' arbitration agreement was validly formed *and* that [2.][a.] it covered the dispute in question *and* [b.] was legally enforceable.").

(Cont'd)

to first resolve the threshold question regarding the making of an arbitration agreement before ordering arbitration. The fact that the AAA rules were involved in *Prima Paint* did not affect this decision.

Yet, the Court of Appeal's precedent in essence stands for the proposition that, notwithstanding the mandatory language of Section 4 of the FAA, *in all AAA arbitrations*, the arbitrators— and not the courts— must resolve issues of validity and enforceability of arbitration agreement. This is not only at odds with *Prima Paint* and Section 4 of the FAA, it also appears to be in conflict with the teachings of *Hall Street*, in that this Court made clear that no one can contract out of the language of the FAA. The Court of Appeals' precedent necessarily raises a number of questions, including whether the AAA now has the power to *in essence* change sections of the FAA by simply incorporating in its rules language that goes against the FAA.

'4. CONCLUDING STATEMENTS REGARDING THE DECISION OF THE COURT OF APPEALS

n *Granite Rock*, the Court held that

> a court may order arbitration of a particular dispute *only* where the court is satisfied that the parties agreed to arbitrate that dispute. To satisfy itself that such agreement exists, *the court* must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.

2010 WL 2518518, *8 (internal citations omitted; emphasis added). Here, as a result of *Hall Street*, Peachtree challenges the validity and enforceability of the particular arbitration provision at issue—which includes the reference to the AAA Rules. Peachtree further contends that no provision (valid or invalid) commits the resolution of such challenge to arbitration. Therefore, it is the duty of the courts to decide the issue before Peachtree is coerced into arbitrating an issue against its contractual rights and expectations. *See e.g.*, *Stolt-Nielsen*, 130 S. Ct. at 1773-74; *Mastrobuono*, 514 U.S. at 57.

By refusing to address this issue, the decision of the Court of Appeals conflicts with the decisions of this Court and misinterprets federal law, to the detriment of parties' substantive rights under the FAA. This case provides the Court the opportunity to do away with this dangerous precedent in the State of New York.

Moreover, the case gives the Court the opportunity to address the question it left unanswered in *Rent-A-Center*, which is whether a challenge by a party to the enforceability of an agreement after this Court's decision in *Hall Street* is a question to be determined by the courts or the arbitrators. *See supra* note 12.

REVIEW IS WARRANTED BECAUSE THERE IS A QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT

A. UNDER HALL STREET, PARTIES ARE PRECLUDED FROM CONTRACTING OUT OF THE EXPRESS TERMS OF THE FAA

In *Hall Street*, the plaintiff argued that the agreement to allow for judicial review of the arbitration award for legal error—which is beyond what the FAA provides—had to prevail because the parties had agreed as much and "arbitration is a creature of contract." 552 U.S. at 587. In response, the Court acknowledged that parties are able to contract for certain aspects of the arbitration, including the set of procedural rules to be applied. *Id.* ("Hall Street is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law."). The Court added, however, that having the ability to agree on certain aspects of the arbitration did not mean that parties could agree to

arbitration under terms that are inconsistent with the text of the FAA:

> to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration. To that particular question we think the answer is yes.

Id. The Court then explained that, as per Section 9 of the FAA, on application for an order to confirm the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected" on the grounds prescribed in the FAA. *Id.* The Court concluded that the judicial review provision at issue there (similar to the one involved here) was unenforceable, as it went beyond the grounds prescribed in the FAA.

Consequently, per this Court's decision in *Hall Street*, an arbitration agreement cannot be enforced in a manner that is at odds with the "textual features" of the FAA, which necessarily includes Section 4 of the FAA. Moreover, it also means that parties may not contract out of the express terms of the FAA, as a matter of law.

B. IT IS UNSETTLED BY THIS COURT WHETHER ISSUES INVOLVING COMPLIANCE WITH A CONDITION PRECEDENT CAN BE DECIDED BY THE ARBITRATORS IN LIGHT OF THE CLEAR TEXT OF SECTIONS 2 AND 4 OF THE FAA

This Court has not explained who, in light of Sections 2 and 4 of the FAA, decides if a party to an arbitration agreement has complied with a condition precedent to arbitration. However, as noted above, the Court has held that Section 2 of the FAA "requires courts to enforce [written provisions to settle by arbitration] *according to their terms*." *Rent-A-Center*, 2010 WL 2471058, at *3-4 (emphasis added).

Furthermore, the mandate in Section 4 of the FAA is straightforward: "[t]he court *shall* hear the parties, and . . . [i]f the making of the arbitration agreement or the *failure, neglect, or refusal to perform the same be in issue*, the court *shall* proceed summarily to the trial thereof." 9 U.S.C. § 4 (2008) (emphasis added). Just like with the "must grant" language of Section 9 at issue in *Hall Street*, "there is nothing malleable about [the terms 'the court shall,' in Section 4] which unequivocally tells courts" to decide the issue of a party's "failure, neglect or refusal" to comply with its obligations under an arbitration agreement. *Hall Street*, 552 U.S. at 587.

Therefore, as a matter of federal substantive law and this Court's decisions in *Rent-A-Center* and *Hall Street*, it is for the courts—not the arbitrators—to determine the threshold questions of whether, as a matter of contract, a party has failed or refused to abide by a condition precedent to arbitration.

At least three Circuit Courts of Appeal have had the opportunity to address this issue, and have ruled that a party may not be forced to arbitrate unless there has been compliance with such a condition. The Fourth Circuit, for example, recently held that where a condition precedent to arbitration is not met, there is no right to arbitration, because the FAA "does not mandate the arbitration of all [contract] claims, but merely the enforcement . . . of privately negotiated arbitration agreements." *Perdue Farms, Inc. v. Design Build Contracting Corp.*, 263 Fed. Appx. 380, 383, 2008 WL 345430, *3 (4th Cir. 2008) (parties agreed to submit dispute to mediation prior to initiating arbitration). Similarly, the First Circuit held that an arbitration provision is not triggered until the condition precedent to arbitration is met, because "Congress did not enact the FAA to 'operate without regard to the wishes of the contracting parties.'" *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (quoting *Mastrobuono*, 514 U.S. at 57); *see also Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002). Under these decisions, therefore, the question of compliance with a condition precedent to the arbitration process could never be answered by an arbitrator. Indeed, to coerce a party to arbitrate the threshold question of compliance with a condition precedent to that very process would essentially eviscerate that party's contractual rights and expectations of *not* arbitrating unless the other party has complied with its obligations prior to arbitration.

However, at least one other Circuit Court of Appeal has reached the opposite conclusion. *See 3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1200 (8th Cir. 2008) (where party

claimed that other party did not comply with a condition precedent to arbitration by failing to conduct quarterly expense reviews was a matter to be decided by the arbitrator).[14]

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[14] In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Court held that "the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge," because "*in the absence of an agreement to the contrary*, issues of substantive arbitrability . . . are for a court to decide and issues of *procedural arbitrability*, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." 537 U.S. at 85 (emphasis added). However, the holding in *Howsam* is inapposite. First of all, the parties herein clearly and unambiguously agreed "that under no circumstances" would Lloyd's be allowed to submit any dispute to arbitration without first complying with the condition precedent. *See supra*. Therefore, there is "an agreement to the contrary" of arbitrating *any question* prior to compliance of the condition precedent. Moreover, the condition precedent at issue here is not of a procedural nature, as it does not "grow out of the dispute and bear on its final disposition." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-558 (1964). Instead, it is a substantive condition precedent dealing with the right to institute an arbitration process at all. As explained by the New York Court of Appeals:

> Whether [a particular condition] falls within the jurisdiction of the courts or of the arbitrators depends on its substance and the function it is properly perceived as playing—whether it is in essence a prerequisite to entry into the arbitration process or a procedural prescription for the management of that process. Under the first heading [the prerequisite to entry into the arbitration process] will come provisions which in

(Cont'd)

This case gives this Court the opportunity to settle these conflicting decisions, and hold that it is for the courts, not the arbitrators, to rule on issues bearing on a party's "failure, neglect, or refusal" to comply with a condition necessary to commence an arbitration agreement.

(Cont'd)

> point of time are intended to be preliminary to the institution of any arbitration proceeding and in a precise sense are unrelated to it, e.g., a requirement that before any demand for arbitration can be made the dispute between the parties be referred to the architect or to the partnership—"conditions precedent" in the literal meaning of that term. Under the second heading [the procedural conditions] will come provisions relating to the conduct of the arbitration proceeding itself . . .

Matter of Arbitration Between County of Rockland and Primiano Construction Co., 51 N.Y.2d 1, 8-9 (1980) (emphasis added). The court went on to explain that where, as here, "contractual limitations are expressly made conditions precedent to arbitration by the terms of the arbitration agreement," a party may be forced to arbitrate "only *if the court determines* that this portion of the agreement to arbitrate has been complied with." 51 N.Y. 2d at 8 (citations omitted; emphasis added).

It should be noted that *Howsam* did not consider Section 4 of the FAA and that it was decided before *Hall Street*. As explained here, under *Hall Street*, the resolution of a condition precedent could not be submitted to arbitration if doing so would be at odds with the mandatory language of the FAA (in this case Section 4).

C. UNDER SECTIONS 2 AND 4 OF THE FAA, THE DETERMINATION OF WHETHER LLOYD'S HAS COMPLIED WITH A CONDITION PRECEDENT TO ARBITRATION IS FOR THE COURTS

Lloyd's agreed that it could only raise disputes as to claims on "which [Lloyd's] make[s] payment" and "that *under no circumstances*" it would be entitled to submit any such dispute "prior to payment of such [c]laim." (A-382, 411, 456, and 492) (Emphasis added.) However, by submitting to arbitration disputes it categorically agreed not to submit "prior to payment of such [c]laim," Lloyd's failed to comply with a condition precedent to arbitration. Because the "failure, neglect, or refusal to perform" its obligations under the arbitration agreement is therefore at issue, the courts are commanded by Section 4 of the FAA to "proceed summarily to the trial thereof." 9 U.S.C. § 4 (2008).

Thus, in light of the language of the FAA and the fundamental principles of arbitration law, this Court should hold that it is for courts—and not the arbitrators—to decide whether Lloyd's has failed to comply with conditions precedent to arbitration.

CONCLUSION

THIS COURT SHOULD INTERCEDE IN THIS MATTER OF COMPELLING FEDERAL ISSUE, AS THE NEW YORK COURT OF APPEALS PUBLISHED DISPOSITION HAS CREATED PRECEDENT THAT ALLOWS PARTIES IN NEW YORK TO CIRCUMVENT THE FAA AND THIS COURT'S DECISIONS

In the CCI Contracts, Peachtree bargained for expanded review of arbitral awards, with the expectation of meaningful judicial review of the arbitrators' legal errors, without the constraints of the FAA's narrow review standards. If the parties' expanded standard of review cannot be enforced after *Hall Street* (which it cannot), neither can the AAA Rules provision, even if that provision properly delegates to the arbitrators the threshold issue of an arbitration agreement's validity and enforceability. This is so because, to the extent the parties agreed to arbitrate their disputes under the AAA Rules, it was with the understanding and expectation that they would have the ability to review all of the arbitrators' rulings for legal errors. Indeed, Peachtree specifically rejected a proposed arbitration agreement that did not include the expanded judicial review provision and it is undisputed that, but for the inclusion of that provision, Peachtree would not have agreed to arbitrate the parties' disputes in the first instance.

Hall Street fundamentally changed the parties' bargain and the Court of Appeals was wrong in enforcing the remainder of that bargain by obligating

Peachtree to proceed with arbitration to the detriment of Peachtree's expectations. This is more so, considering that the parties agreed in the CCI Contracts "that *under no circumstances*" would Lloyd's be allowed to arbitrate any dispute unless it first complied with a certain condition—a condition which Lloyd's failed to comply prior to coercing Peachtree into arbitration.

Thus, unless the Court reverses the decision below, Peachtree's contractual rights and expectations will be trampled. Indeed, unless the Court reverses the decision below, *any party* in New York who follows this precedent will be allowed to circumvent Sections 2 and 4 of the FAA and trump the federal legal framework established by this Court's decisions. That would have the result of "elevating" agreements that refer to the AAA Rules "over other forms of contract," something this Court expressly rejected as contrary to substantive arbitration law. *Rent-A-Center*, 2010 WL 2471058, at *7.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 2010

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED MAY 4, 2010

COURT OF APPEALS OF NEW YORK

No. 138 SSM 12

LIFE RECEIVABLES TRUST,

Plaintiff,

v.

GOSHAWK SYNDICATE 102 AT LLOYD'S,

Respondent,

Life Settlement Corporation, Doing Business as Peach Tree Life Settlements,

Appellant.

May 4, 2010

MEMORANDUM:

The order of the Appellate Division should be affirmed with costs. The certified question should not be answered as unnecessary.

The Appellate Division properly concluded that the scope and validity of the parties' arbitration agreement, including issues of arbitrability, are for the arbitration tribunal to determine (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45-47, 689 N.E.2d

884, 666 N.Y.S.2d 990 [1997]; *Contec Corp. v Remote Solution, Co., Ltd.*, 398 F3d 205, 211 [2d Cir 2005]). Although *Hall St. Assocs., L.L.C. v. Mattel, Inc.* (552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 [2008]) prohibits parties from expanding, by their own agreement, the scope of judicial review beyond that authorized by the Federal Arbitration Act, clear and unmistakable evidence exists in this case that the parties agreed to arbitrate questions of arbitrability, including whether the parties' arbitration agreement is invalid under *Hall St. Assoc.* or whether the apparently offending provision could be severed from the remainder of the agreement.

On review of submissions pursuant to section 500.11 of the Rules, order affirmed, with costs, and certified question not answered upon the ground that it is unnecessary, in a memorandum.

Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

APPENDIX B — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED OCTOBER 13, 2009

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

194N, 601244/08

LIFE RECEIVABLES TRUST,

Plaintiff-Appellant,

v.

GOSHAWK SYNDICATE 102 AT LLOYD's,

Defendant-Respondent,

Life Settlement Corporation, doing business as Peach Tree Life Settlements,

Defendant-Appellant.

Oct. 13, 2009

SAXE, J.P., BUCKLEY, McGUIRE, DeGRASSE, FREEDMAN, JJ.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 30, 2008, which denied plaintiff's motion to stay or enjoin arbitrations pending before the American Arbitration Association (AAA), affirmed, without costs.

Appendix B

The arbitration agreement at issue requires that "[a]ll disputes and differences arising under or in connection with this [contract] . . . be referred to arbitration under the American Arbitration Association Rules." The AAA rules authorize the arbitration tribunal to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement. Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that "[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement," and employs language referring "all disputes" to arbitration, courts will "leave the question of arbitrability to the arbitrators" (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 47, 689 N.E.2d 884, 666 N.Y.S.2d 990 [1997] [internal quotation marks omitted]). Thus, the motion court was correct in finding that the scope and validity of the arbitration agreement, necessarily including issues of arbitrability, are for the arbitration tribunal to determine.

The stay and injunctive relief sought by plaintiff are not warranted by the inclusion in the arbitration agreement of a provision that gives the parties the right to challenge the arbitrators' determination on the ground that the panel made an error of law. Although the United States Supreme Court recently held that the Federal Arbitration Act does not permit parties to expand, by their own agreement, the scope of judicial

review beyond that authorized by the Act (*see Hall St. Assoc., L.L.C. v Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 [2008]), this Court need not reach the issue of whether that portion of the parties' arbitration provision is severable from the remainder of the arbitration provision, since that issue is necessarily included among the arbitrability issues that the parties' agreement reflects would be decided by the arbitrators (*see Contec Corp. v Remote Solution Co., Ltd.*, 398 F3d 205, 211 [2d Cir 2005]).

The policy of this State, like the federal policy discussed in *Hall Street Associates*, favors arbitration "with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway," and therefore seeks to avoid "the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring arbitration theory to grief in post-arbitration process" (*id.* at 1405 [internal citations, quotation marks and brackets omitted]). "[T]his State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties . . . Therefore New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*Smith Barney*, 91 NY2d at 49-50 [internal citation and quotation marks omitted]). Permitting the arbitration to proceed at this juncture fully comports with that policy.

Appendix B

All concur except McGUIRE, J. who concurs in a separate memorandum as follows: McGUIRE, J. (concurring)

The parties agree that their arbitration agreement is subject to the Federal Arbitration Act (FAA) (9 USC § 10[a]). The agreement provides in relevant part that "the parties shall each retain the rights to appeal errors of law to a court of law having jurisdiction in the matters addressed herein . . ." In *Hall Street Assocs. v Mattel, Inc.* (552 U.S. 576, 128 S Ct 1396, 170 L. Ed. 2d 254 [2008]), an arbitration agreement contained a similar provision, purporting to authorize judicial review of any erroneous conclusions of law by the arbitrator; and the Supreme Court held that the grounds for judicial review specified in the FAA cannot be supplemented by contract. Thus, *Hall Street* renders unenforceable the provision in the arbitration agreement providing for judicial review of errors of law by the arbitrator. The principal issue on this appeal is whether a court or the arbitration panel should decide if the arbitration agreement is invalid because of the unenforceability of the provision providing for judicial review of errors of law.

To resolve that issue, the principles set forth in *First Options of Chicago, Inc. v Kaplan* (514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 [1995]) should be reviewed. As the Supreme Court reiterated, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that

govern formation of contracts" (*id.* at 944). Here, as in *First Options*, "[t]he relevant state law . . . would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration" (*id.*). The Court stressed, however, that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so" (*id.* [brackets and internal quotation marks omitted]). As the Court explained, "[i]n this manner the law treats silence or ambiguity about the question *who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question *whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'" (*id.* at 944-945 [emphasis in original]).

Although a presumption in favor of arbitrability applies when the latter question is at issue, the Court provided two reasons supporting a presumption against arbitration when the former question is at issue. First, because the question of " who (primarily) should decide arbitrability' . . . is rather arcane," "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers" (*id.* at 945 [internal quotation marks omitted]). Second, "given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration," courts are hesitant "to interpret silence or ambiguity on the who should decide arbitrability' point as giving the arbitrators that power" (*id.*). After all, so to interpret silence or ambiguity "might

too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide" (*id.*).

In this case, there is "clear and unmistakable" evidence that the parties' dispute about the validity of the arbitration agreement in light of the Supreme Court's decision in *Hall Street* is one they agreed to arbitrate. Putting aside the breadth of their agreement to arbitrate "[a]ll disputes and differences arising under or in connection with this Insurance" (even though the current dispute about the validity of the arbitration agreement is one that "arises" both "under" and "in connection with" the Contingent Cost Insurance contracts of which the arbitration agreement is a part), the parties also agreed in each of the four CCI contracts that all such disputes and differences would be referred to arbitration under the rules of the American Arbitration Association (AAA). Article 15.1 of the AAA rules specifies that "[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement."

Appellants, commercially sophisticated entities, do not claim they were unaware of the content of the AAA rules to which they expressly agreed to be bound. Thus, far from being silent or ambiguous about the question of who should decide arbitrability, the arbitration agreement provides objective and unequivocal proof that the parties did "focus upon that question [and] upon the significance of having arbitrators decide the

scope of their own powers" (*First Options*, 514 U.S. at 945, *supra*). Indeed, the Second Circuit has held that "when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator" (*Contec Corp. v Remote Solution, Co., Ltd.* (398 F3d 205, 208 [2005]). Thus, in *Contec*, where the arbitration agreement incorporated a rule identical in relevant part to article 15.1, the Second Circuit rejected the claim of Remote Solution, a signatory to the arbitration agreement, that it could not be compelled to arbitrate with a non-signatory, i.e., the corporate successor to the agreement's other signatory. Agreeing with the "virtually indistinguishable" (*id.* at 210) decision of the First Circuit in *Apollo Computer, Inc. v Berg* (886 F2d 469 [1989]), the Second Circuit concluded that because Remote Solution "agreed to be bound by provisions that clearly and unmistakably allow the arbitrator to determine her own jurisdiction over an agreement to arbitrate whose continued existence and validity is being questioned, it is the province of the arbitrator to decide whether a valid arbitration agreement exists" (*Contec*, 398 F3d at 211 [internal quotation marks omitted]).[1]

1. Similarly, in *Matter of Smith Barney Shearson v Sacharow* (91 NY2d 39, 689 N.E.2d 884, 666 N.Y.S.2d 990 [1997]) the arbitration agreement incorporated the rules of the NASD Code, including a provision that arbitrators are " empowered to interpret and determine the applicability of all provisions under this Code and to take all appropriate action to obtain

(Cont'd)

Appendix B

Relying principally on *Cap Gemini Ernst & Young, US, LLC v Nackel* (346 F3d 360 [2003]) and *Nichols v Washington Mut. Bank* (2007 WL 4198252, 2007 U.S. Dist. LEXIS 85936 [ED NY 2007]), appellants advance a formidable argument in support of their position that judicial resolution of their challenge to the validity of the arbitration agreement is necessary. In *Cap Gemini*, the employment agreement between the parties contained an arbitration clause that broadly provided for arbitration of, inter alia, "[a]ny dispute, controversy or claim . . . arising out of [the] employment," and incorporated the "commercial arbitration rules then obtaining of the [AAA]" (346 F3d at 364 n3. It appears (*id.* at 364 n3, 366), and we are informed by appellants, that those rules included a provision identical in relevant part to article 15.1. The employee argued he could not be compelled to arbitrate his claims against Cap Gemini because the arbitration agreement was invalid as unconscionable under California law (*id.* at 364). Although the Second Circuit remanded to the District Court to determine, inter alia, whether New York or California law governed the validity of the

(Cont'd)

compliance with any ruling by the arbitrator(s)'" (*id.* at 46-47). Although that provision is surely less unequivocal on the question of who should decide arbitrability than the AAA rule at issue in this case and in *Contec*, the Court of Appeals noted with apparent approval that "[c]ourts have interpreted the incorporation of this provision in the agreements of parties as a clear and unmistakable expression of their intent to leave the question of arbitrability to the arbitrators" (*id.* at 47 [internal quotation marks omitted]).

arbitration agreement, the panel held that "before proceeding to determine the scope of the arbitration agreement, the court must first confirm that the agreement is valid and enforceable" (*id.* at 366; *see also id.* at 365 ["[i]t is clear that questions of contractual validity relating to the unconscionability of the underlying arbitration agreement must be resolved first, as a matter of state law, before compelling arbitration pursuant to the [Federal Arbitration Act, 9 USC § 16]"]).

In *Nichols*, the arbitration agreement was similarly broad — it provided for arbitration of "[a]ny controversy or claim arising out of or relating to th[e] contract, or the breach thereof'" (2007 WL 4198252 at *6, 2007 U.S. Dist. LEXIS 85936 at *20)—and it also incorporated an AAA rule identical in relevant part to article 15.1 (WL *id.* at *7, LEXIS *id.* at *22). Nichols, the party resisting arbitration, challenged the validity of the arbitration agreement on the ground that it was unconscionable under New York law (and on two other grounds that are noted below), and the District Court agreed that judicial resolution of her challenges was necessary. The court recognized that in *Contec* the Second Circuit "expressly found that an arbitration clause incorporating [a provision authorizing the arbitrator to rule on objections with respect to the existence, scope or validity of the arbitration agreement] sufficed to render the question of arbitrability itself arbitrable" (WL *id.*, LEXIS *id.*). Nonetheless, citing *Cap Gemini*, the court broadly stated that when a party challenges "the existence or validity of the arbitration clause itself,

courts must determine whether the arbitration clause exists, and whether it is valid" (WL *id.*, LEXIS *id.* at *22-23).

Cap Gemini does not purport to hold that all issues concerning the validity of an arbitration agreement are invariably for the courts. To the contrary, the Second Circuit limited its holding to validity questions "relating to the unconscionability of the underlying arbitration agreement" (346 F3d at 365). Moreover, a sweeping rule that all questions relating to the validity of an arbitration agreement must be resolved by the courts would entail a startling proposition: parties to an arbitration agreement lack the power (freedom of contract) to agree that any issues relating to the validity of the agreement should be submitted to arbitration. That this proposition is contrary to settled law is apparent when one considers a hypothetical arbitration agreement that both envisions the possibility the Supreme Court might rule as it did in *Hall Street* and expressly provides that in the event of such a holding the question of the validity of the arbitration agreement would be submitted to arbitration. Such an agreement surely would be enforceable, given that "it is settled that the validity of an arbitration agreement is to be determined by the law applicable to contracts generally" (*Sablosky v Gordon Co.*, 73 NY2d 133, 137, 535 N.E.2d 643, 538 N.Y.S.2d 513 [1989]), public policy strongly favors arbitration (*Smith Barney*, 91 NY2d at 49) and "New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*id.* at 49-50 [internal quotation marks omitted]).

Appendix B

In light of the holding in *Hall Street*, the conclusion that the issue of the validity of the arbitration agreement is one the parties agreed to arbitrate is not as indisputable in this case as it is in the hypothetical case. But it nonetheless is supported by clear and unmistakable evidence (*Contec*, 398 F3d at 208, *supra*) and should be enforced. The effect of the agreement to arbitrate under the rules of the AAA was to adopt and incorporate article 15.1 into each of the CCI contracts (*Matter of Level Export Corp.* [*Wolz, Aiken & Co.*], 305 NY 82, 86, 111 N.E.2d 218 [1953]). Under settled principles of contract law, the contract language stating that disputes about the validity of the arbitration agreement are to be arbitrated cannot be disregarded (*Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 49, 492 N.Y.S.2d 760 [1985], *affd for reasons stated* 66 NY2d 1020, 489 N.E.2d 1299, 499 N.Y.S.2d 397 [1985] [stating that courts should not disregard provisions of contract that are clear and unequivocal]). Rather, as appellants do not even claim that they failed to read article 15.1, they are conclusively bound by its terms (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 304, 751 N.E.2d 936, 727 N.Y.S.2d 688 [2001] ["a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it"]).

On the other hand, not all questions relating to the validity of an arbitration agreement are for the arbitrator when an arbitration agreement expressly provides for arbitration of questions relating to its validity. Rather, judicial resolution of some such

questions is appropriate. If, for example, a signatory to the agreement did not knowingly agree to arbitration at all (or to arbitration of disputes about its validity) as a result of fraudulent conduct by the other signatory, the assent necessary to enforcement of a contract would be lacking (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109, 417 N.E.2d 541, 436 N.Y.S.2d 247 [1981] ["before one may secure redress in our courts because another has failed to honor a promise, it must appear that the promisee assented to the obligation in question"]).[2] A claim that an arbitration agreement is unconscionable similarly calls into question the fundamental matter of its enforceability (*Matter of State of New York v Avco Fin. Serv. of N.Y.*, 50 NY2d 383, 390, 406 N.E.2d 1075, 429 N.Y.S.2d 181 [1980] [noting that claim of unconscionability of contract clause encompasses "deception . . . as to the clause's content or existence or the presence of language difficulties or illiteracy affecting its execution, or any other reasons that would have made it *unlikely that consent was freely and knowingly given*"] [emphasis added; citations

2. Thus, in *Nichols*, Nichols also claimed that she was unaware of the arbitration clause in the contract and the District Court reviewed (and rejected) that claim (2007 WL 4198252 at *7, 2007 US Dist LEXIS 85936, *24-25). The District Court also reviewed and rejected Nichols' claim that the arbitration clause was invalid under General Business Law § 399-c, which prohibits mandatory arbitration clauses in contracts for the sale or purchase of consumer goods (WL *id.* at *9, LEXIS *id.* At *29-30). We need not determine whether we agree that such a challenge to an arbitration agreement is one that courts must resolve when the parties agree to arbitrate questions relating to its validity.

omitted]; *see also King v Fox*, 7 NY3d 181, 191, 851 N.E.2d 1184, 818 N.Y.S.2d 833 [2006]).

To be sure, appellants contend that the arbitration agreement is entirely unenforceable because they would not have agreed to arbitration if they had known, as *Hall Street* subsequently held, that the provision authorizing appeals of errors of law to a court of law was invalid. That contention, however, is inconsistent with the parties' agreement to arbitrate questions relating to the validity of the agreement. The parties did not agree to arbitrate only meritless challenges to the validity of the arbitration agreement. Rather, they clearly contemplated the possibility that the arbitrators might determine to invalidate the arbitration agreement. It makes no sense to suppose that the parties contemplated that such a determination itself would be invalid.

It may be that appellants would not have agreed to arbitration if they had known the parties could not obtain judicial review of errors of law. And it also may be that for this reason they cannot be compelled to arbitrate any substantive disputes with respondent. But it does not follow that the specific agreement to arbitrate disputes over the validity of the arbitration agreement is unenforceable. To the contrary, that agreement should be regarded as a distinct agreement that is enforceable unless a specific challenge to its validity is raised. Because appellants do not contend that they did not freely and knowingly consent to arbitrate questions relating to the validity of the arbitration agreement,

their challenge to the validity of the agreement is one for the arbitrators to determine.

Appellants' additional arguments in support of a stay of the arbitration proceeding are similarly not subject to judicial review. Although respondent apparently commenced the arbitration prior to paying the claims in violation of the contract's "pay first" provision,[3] the effect of such a violation raises a question regarding arbitrability that, as discussed above, must be decided by the arbitrators.

---

3. The contract provided that indemnification from appellant Peachtree is respondent Lloyd's "sole and exclusive remedy" and that "under no circumstances . . . shall [Lloyd's] be entitled to submit any dispute" regarding its obligation to pay a claim to arbitration "prior to payment of such claim . . ."

APPENDIX C — ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED DECEMBER 22, 2009

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on December 22, 2009.

PRESENT: Hon. David B. Saxe, Justice Presiding,
John T. Buckley
James M. McGuire
Leland G. DeGrasse
Helen E. Freedman, Justices.

M-5179
Index No. 601244/08

Life Receivables Trust,

Plaintiff-Appellant,

-against-

Goshawk Syndicate 102 at Lloyd's,

Defendant-Respondent,

Life Settlement Corporation, doing business as Peach Tree Life, Settlements,

Defendant-Appellant.

Appendix C

Defendant-appellant having moved for reargument of, or leave to appeal to the Court of Appeals from, the decision and order of this Court entered on October 13, 2009 (Appeal No. 194N),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion, insofar as it seeks reargument, is denied.

It is further ordered that the motion, to the extent it seeks leave to appeal to the Court of Appeals, is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of this Court, which affirmed the order of the Supreme Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

s/ [illegible]
DEPUTY CLERK

APPENDIX D — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, COMMERCIAL DIVISION DATED SEPTEMBER 19, 2008 AND FILED SEPTEMBER 30, 2008

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: COMMERCIAL DIVISION

Index No.
601244/08

LIFE RECEIVABLES TRUST,

Plaintiff,

-against-

GOSHAWK SYNDICATE 102 at LLOYD'S,

Defendant

Charles Edward Ramos, J.S.C.:

Motion sequence number 001 and 002 are consolidated for disposition.

In motion sequence 001, plaintiff Life Receivables Trust (LRT) moves to stay the arbitration before the American Arbitration Association's (AAA) International Center for Dispute Resolution (ICDR) arising out of a

rescission agreement[1] (Rescission Arbitration) pursuant to 9 USC § 1 of the Federal Arbitration Act (FAA), and to enjoin the arbitration before the ICDR, entitled the Wang Arbitration.[2]

In motion sequence 002, defendant Goshawk Syndicate 102 at Lloyd's (Syndicate 102) moves to join non-party Life Settlement Corporation d/b/a Peachtree Life Settlements pursuant to CPLR 1001.

Background[3]

LRT is a special purpose business trust that owns a portfolio of life insurance policies originally purchased by non-party Peachtree, a life settlement provider. As the owner and beneficiary of the policies, LRT funds payment of the premiums and becomes entitled to the insurance proceeds when the policies mature.

---

1. This arbitration is entitled Goshawk Dedicated Ltd., as the sole Member of Syndicate 102 at Lloyd's for the 2000 Underwriting Year of Account, and Kite Dedicated Ltd., f/k/a Goshawk Dedicated (No. 2) Ltd., as the sole Member of Syndicate 102 at Lloyd's for the 2001-2003 Underwriting Years of Account v. Life Receivables Trust, and Life Settlement Corporation, d/b/a Peachtree Life Settlements.

2. This arbitration is entitled Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's. There is an additional arbitration proceeding involving the parties, referred to in their papers as the Omnibus Arbitration.

3. The facts set forth herein are taken from the pleadings, or the Affidavit of Dale Christensen, Esq., unless otherwise noted.

Appendix D

A life settlement provider may purchase insurance policies and sell them to investors. Contingency cost insurance (CCI) is used as a financial guarantee against the risk that the seller of the life insurance policy will live beyond a specified period.

Beginning in 2000, Syndicate 102 issued CCI agreements to LRT, pursuant to which it charged and collected nearly $8 million to hedge LRT's risk that a life insured might live beyond the specified life expectancy. Non-party Peachtree was the servicer and originator under the CCI agreements. LRT alleges that Syndicate 102 has not paid a single claim to date under the CCI agreements.

The CCI agreements contain identical arbitration provisions in section 30 (Arbitration Agreement), that state,

> 1. All disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the American Arbitration Association Rules.
>
> 3. The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute provided that *the parties shall each retain the right to appeal errors of law to a court of law* having jurisdiction of the matters addressed herein (emphasis added).

Appendix D

The CCI agreements additionally contain identical provisions entitled "Recourse," (Recourse Provision) that state that Syndicate 102's obligation to pay is absolute, and not subject to any set-off or counterclaim.

Further, the Recourse Provision requires Peachtree to indemnify Syndicate 102 against any losses as to which Syndicate 102 make payment to LRT, if the losses result from breach by Peachtree of certain representations and warranties.

In September 2005, LRT commenced the Wang Arbitration to recover damages under certain CCI agreement for two claims denied by Syndicate 102 in July 2005.

In March 2008, defendant Syndicate 102 commenced the Rescission Arbitration against both LRT and Peachtree, seeking to rescind its obligations under the CCI agreements to which LRT and Syndicate 102 are parties, based on alleged fraudulent life expectancies that Peachtree supplied for a number of life insured (Smoak Affidavit, Exhibit 1).

When syndicate 102 sought an order from the AAA directing the parties to name arbitrators, LRT filed a federal action seeking to stay both the arbitrations, which was dismissed for lack of subject matter jurisdiction. Thereafter, LRT commenced this action.

Appendix D

Discussion

LRT seeks a stay of the Arbitrations on the ground that the U.S. Supreme Court's recent decision in *Hall Street Assocs. L.L.C. v Mattel, Inc.* (128 US 1396 [2008]) renders the parties' Arbitration Agreement a nullity, because it expands the scope of judicial review of arbitration awards beyond the grounds explicitly set forth in the FAA.

Moreover, LRT contends that Syndicate 102's obligation to pay its claims are absolute, and that the Recourse Provision in the CCI agreements precludes Syndicate 102 from asserting any defense to coverage against LRT or any of its beneficiaries. LRT argues that Syndicate 102's sole and exclusive remedy involving losses relating to wrongdoing on the part of Peachtree is against Peachtree only, under the Recourse Provision.

In opposition, Syndicate 102 and Peachtree assert that in the Arbitration Agreement, the parties unequivocally agreed that arbitrators, and not the Court, would determine issues of arbitrability, and that the issues decided by the Supreme Court in *Hall Street Assocs.* (128 US 1396) are inapplicable to this action. This Court agrees, and for the reasons set forth below, the motion to stay arbitration is denied.

The Federal Arbitration Act (FAA) applies to the determination of whether the parties made a valid agreement to arbitrate their disputes, because the CCI agreements affect interstate commerce (*Gerling Global*

Reinsurance Corp. v Home Ins. Co., 302 AD2d 118, 124 [1st Dept 2002], *lv denied* 302 AD2d 118 [2003]).

The plain and expansive language employed in section 30 of the Arbitration Agreement unequivocally establishes that the parties agreed to arbitrate their disputes arising out of the CCI agreements, by use of the phrase "all disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the [AAA]" (*Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading Inc.*, 252 F3d 218, 226 [2d Cir], *cert denied* 534 US 1020 [2001] [terms such as "any dispute, "relating to" and "arising under" indicate a broad arbitration clause]).

Moreover, the Arbitration Agreement incorporates by reference all of the AAA rules. Under Article 15.1 of the IDPR rules of the AAA, arbitrators, not the court, decide the "existence, scope, or validity" of an arbitration agreement (IDRP Article 15.1).

Where, as here, the parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, that incorporation constitutes clear and unmistakable evidence that arbitrability is to be decided by the arbitrators (*Contec Corp. v Remote Solution Co. Ltd.*, 398 F 3d 205, 208 [2d Cir. 2005]).

LRT challenges the scope of the Arbitration Agreement, and contends that the dispute over payment of claims is not subject to arbitration because of the Recourse Provision. Additionally, LRT challenges the

validity of the Arbitration Agreement itself, relying upon Supreme Court's decision in *Hall Street Assocs. L.L.C.* (128 US 1396). However, the scope and validity of the Arbitration Agreement is for the arbitrators to determine.

In any event, at issue in *Hall Street Assocs.* (128 US 1396) was whether the grounds set forth in the FAA for either vacating, modifying or correcting an arbitration award constitute the exclusive grounds for the vacatur or modification of an award.[4]

The issue arose in the context of a lower court's vacating of an arbitration award based upon a provision contained in the underlying arbitration agreement that permitted the parties to vacate or modify the award if the arbitrator's conclusions of law were erroneous (*id.* at 1398). This ground for vacating or modifying an arbitration award is not explicitly set forth in FAA

4. The FAA, in 9 USC §§ 10 12, enumerates limited grounds on which a court may vacate, modify or correct an arbitral award.

In the Arbitration Agreement, the parties contracted to expand the scope of judicial review of arbitration awards beyond the grounds explicitly set forth in the FAA.

Section 30 of the Arbitration Agreement states that, "The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute provided that the parties shall each retain the right to appeal errors of law to a court of law having jurisdiction of the matters addressed herein."

§§ 9-11. The Supreme Court concluded that the grounds set forth in the FAA for vacating or modifying an arbitration award constitute the exclusive grounds for vacatur and modification, and that parties cannot, by contract, expand upon these grounds (*id.* at 1405). Ultimately, the Supreme Court remanded the case for determination of issues independent of the grounds for judicial enforcement of arbitration awards (*id.* at 1399).

There is no basis to conclude that the holding in *Hall Street Assocs.* (128 US 1396) mandates the invalidation of the parties' agreement to arbitrate by this Court, simply because the Arbitration Agreement contains a provision expanding the availability of judicial review of an award beyond those exclusive grounds set forth in the FAA. Undoubtedly, such an application of *Hall Street Assocs.* (*id.*) would conflict with the strong federal policy favoring arbitration that seeks to "place arbitration agreements on equal footing with all other contracts" (*Hall Street Assocs.*, 128 US at 1402). Additionally, it is not a basis upon which to stay arbitration (*see generally Kyocera Corp. v Prudential -Bache Trade Services, Inc.*, 341 F 3d 987 [9th Cir 2003], *cert dismissed* 540 US 1098 [2004]).

Nonetheless, the issue that arises is whether the holding in *Hall Street Assocs.* requires severability of that portion of the Arbitration Agreement that runs afoul of the FAA.[5]

---

5. The Supreme Court chose not to address the issue of severability, because it was not a basis for certiorari (*Hall Street Assocs.*, 128 US at 1405, fn 6).

Appendix D

The issue of whether an agreement's provisions are severable is ordinarily a question of the parties' intent for the Court to determine (*Atlantic Mut. Ins. Co. v. Balfour MacaLaine Intl. Ltd.*, 85 F 3d 68, 81 [2nd Cir 1996]). However, determining the severability of an expanded judicial review clause in the context of arbitration agreements subject to the FAA has not been addressed by a New York court subsequent to *Hall Street Assocs.*

In light of the parties' explicit agreement that the existence, scope, or validity of the Arbitration Agreement is to be determined by the arbitrators, and the strong federal policy favoring arbitration that dictates that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration (*Hall Street Assocs.*, 128 US at 1402; *Bank Julius Baer & Co. v Waxfield Ltd.*, 424 F3d 278, 281 [2d Cir 2005]), the severability of the expanded judicial review clause is for the arbitrators to determine. In any event, severability prior to an application to confirm, vacate or modify an arbitration award is premature. Therefore, LRT's motion to stay arbitration is denied.

Finally, Syndicate 102's motion to join Peachtree as a necessary party is granted without opposition (June 25, 2008 Transcript, 41:3-12).

Accordingly, it is

ORDERED that plaintiff's Life Receivables Trust's motion to stay arbitration is denied; and it is further

ORDERED that defendant's motion to join non-party Life Settlement Corporation d/b/a Peachtree Life Settlements is granted.

Dated: September 19, 2008

ENTER:

s/ Charles E. Ramos
HON. CHARLES E. RAMOS
J.S.C.

APPENDIX E — ORDER OF THE COURT OF APPEALS OF NEW YORK DATED JULY 1, 2010

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of July, 2010

Present, HON. JONATHAN LIPPMAN, *Chief Judge*, ***presiding***.

Mo. No. 2010-708

Life Receivables Trust,

Plaintiff,

v.

Goshawk Syndicate 102 at Lloyd's,

Respondent,

Life Settlement Corporation,
Doing Business as Peach Tree Life Settlements,

Appellant.

A motion for reargument to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reargument be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX F — RELEVANT STATUTES

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Appendix F

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the

making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

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(2)

No. 10-168

Supreme Court, U.S.
FILED
SEP 0 3 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LIFE SETTLEMENT CORPORATION
d/b/a PEACHTREE LIFE SETTLEMENTS,

Petitioner,

v.

GOSHAWK DEDICATED LIMITED AND KITE DEDICATED LIMITED F/K/A GOSHAWK DEDICATED (NO. 2), AS MEMBERS OF SYNDICATE 102 AT LLOYD'S,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION

MICHAEL J. LEVIN
COUNSEL OF RECORD
R. STEVEN ANDERSON
EVAN L. SMOAK
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QUESTIONS PRESENTED

1. Has Petitioner presented compelling reasons to grant the Petition, where the New York Court of Appeals held that where the parties agree to arbitrate "all disputes", including the "existence, scope or validity of the arbitration agreement", the arbitrators should decide Petitioner's challenge to the "existence" or "validity" of the Arbitration Agreement after this Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)?

2. Has Petitioner presented compelling reasons to grant the Petition, where in deciding a now moot issue, the New York Court of Appeals held that in light of the parties' agreement to arbitrate the "scope . . . of the arbitration agreement", the arbitrators should decide Petitioner's challenge to the "scope" of the Arbitration Agreement in light of the Pay First clause of the contract?

PARTIES TO THE PROCEEDING

The Petitioner, who was the appellant below and a defendant before the motion court, is Life Settlement Corporation d/b/a Peachtree Life Settlements.

The Respondents, who were the appellees below and also defendants before the motion court, are the two underwriting members of Lloyd's Syndicate 102: Goshawk Dedicated Limited, as sole member for the 2000 year of account, and Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2) Limited as sole member for the 2001-03 years of account.[1]

Respondent Goshawk Dedicated Limited is wholly owned by Goshawk Capital Limited, which is wholly owned by Goshawk Insurance Holdings plc, which is a publicly held company.

Respondent Kite Dedicated Limited f/k/a Goshawk Dedicated (No. 2) Limited does not have a parent corporation and the following are corporations that own 10% or more of its stock:

Dawn Group Limited
Grafton Group UK, plc
Hilton Group, plc
Peacock Group Retail Limited
William Grant & Sons Limited

---

[1] Contrary to references in Peachtree's Petition, Lloyd's of London is not a party to the Arbitration Agreement, underlying arbitrations, or this action.

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OTHER SOURCES

A Dictionary of Arbitration and its Terms (Katherine Seide ed., Am. Arb. Ass'n 1970)..... 13

INTRODUCTION

Petitioner Life Settlement Corporation d/b/a Peachtree Life Settlements ("Peachtree") has presented no "compelling reasons" for the Court to grant its Petition for a Writ of Certiorari ("Petition"). *See* Sup. Ct. R. 10. The parties specifically agreed to arbitrate "any dispute" including "the existence, scope and validity of the arbitration agreement." Peachtree has never challenged the delegation provision within the arbitration agreement. A total of thirteen judges on three New York courts have now considered this issue and all have correctly enforced the parties' agreement that the arbitrators should determine the "validity" of the agreement in light of *Hall Street*. The courts also correctly found, consistent with this Court's precedent, that the "scope" of the arbitration agreement, including the effect *vel non* of the contract's Pay First Clause, is for the arbitrators, not the court, to decide by reason of the parties' arbitration agreement.

The New York Court of Appeals' decision to which Petitioner's Petition is addressed (the "Decision") is consistent with relevant decisions of this Court. This Court has stated that the Federal Arbitration Act ("FAA") "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). In *AT&T Techs, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986), the Court stated that parties may agree to arbitrate arbitrability. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.

938, 942-43 (1995), the Court held that where there is clear and unmistakable evidence that the parties so agreed, the arbitrators could decide the question of whether the parties agreed to arbitrate. Subsequently, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), the Court explained that whether the parties are bound by a given arbitration clause, and whether a binding arbitration clause applies to a particular type of controversy, are questions of arbitrability. The Court also held in *Howsam* that procedural questions concerning pre-requisites to arbitration are for the arbitrators to decide. *Id.* at 84-85.

In *Preston v. Ferrer*, 552 U.S. 346, 362-363 (2008), this Court looked to the arbitral rules incorporated by reference in an arbitration agreement. Just a few short months ago, in *Rent-A-Center, West, Inc., v. Jackson*, 130 S.Ct. 2772, 2777 (2010), the Court stated "[w]e have recognized that parties can agree to arbitrate 'gateway' questions of arbitrability, such as whether the parties agreed to arbitrate or whether their agreement covers a particular dispute." Unless a party "challenged the delegation provision specifically, courts must treat it as valid and leave any challenge to the arbitration agreement as a whole to the arbitrator. *Id.* at 2779. The Court also held that a challenge not mentioned below to the delegation provision is "too late and we will not consider it." *Id.* at 2781.

Consistent with this Court's authority, the New York Court of Appeals held that pursuant to the clear and unmistakable language of the Arbitration Agreement and the arbitration rules

incorporated therein, Peachtree agreed to arbitrate the existence, scope and/or validity of the arbitration agreement. Pet. App. at 1a-2a. Thus, Peachtree, agreed to arbitrate its challenge to the "existence" or "validity" of the Arbitration Agreement in light of *Hall Street*. Moreover, Peachtree's "Pay First" argument goes to the "scope" of the arbitration agreement, and thus, must be decided by the arbitrators. As noted above, Peachtree has never challenged the delegation provision within the Arbitration Agreement.

The Decision is also correct because the Petitioner misconstrues the *Hall Street* decision, which did not eliminate judicial review of arbitration awards. *Hall Street* says only that Sections 10 and 11 are the exclusive grounds for vacatur under the FAA.

Simply put, the New York Court of Appeals correctly applied this Court's precedents in reaching its decision. Thus, the Petition should be denied.

STATEMENT OF THE CASE

A. The Parties.

1. Peachtree.

Peachtree is a "Settlement Provider," which means that Peachtree buys life insurance policies issued on the lives of the elderly ("life settlements"). Pet. App. at 20a. Upon purchase, the life insured receives an immediate payment, while Peachtree (or its assignee, Life Receivables Trust

["LRT"]) becomes the new policy owner and beneficiary on the life policy and becomes responsible for paying premiums to maintain the life policy. *Id.*

2. LRT.

LRT is a special purpose vehicle that Peachtree created through an affiliate to hold in trust the life insurance policies originated and serviced by Peachtree. *See id.* By the terms of the agreements establishing LRT, LRT was to be a passive entity with no employees. *See* Trust Agreement (RA:210).[2] Everything LRT "did" in terms of its business operations was in fact done for it by its admitted "agent",[3] creator, Servicer, and Originator, Peachtree. *See* LRT's May 4, 2006 letter (RA:270-84); *see also* CCI at p. 2 of 24 (RA:21, RA:50, RA:95, RA:131).

3. Syndicate 102.

The risk to Peachtree or its assignee, LRT, lies in the possibility that the life insureds will live for many years, thereby extending the time that Peachtree or LRT must pay premiums to maintain the life policies and delaying the time for LRT to collect the net death benefit under the life policy. Purportedly to hedge against this risk, Peachtree

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[2] The citations to the Joint Appendix and the Confidential Respondent's Appendix filed with the New York Appellate Division are referenced in this brief as "A:__" and "RA:__", respectively.

[3] *See* LRT's September 14, 2005 Statement of Claim at ¶ 25 (A:276-77).

procured Contingent Cost Insurance ("CCI") for LRT from Syndicate 102.[4] Pet. App. at 21a. The CCI was to cover the risk of aberrational life over-run on every life policy acquired by Peachtree against the contingency that one or more of the life insureds would live more than a prescribed "Deferred Period" (typically, two years) beyond the Life Expectancy ("LE") determined by an independent medical life evaluator (*i.e.*, LE + 2 years = trigger date). *See* CCI "Interest" and "Deferred Period" at p. 3 of 24 (RA:22, RA:51, RA:96, RA:132).

Peachtree hired the medical evaluator (such as American Viatical Services or "AVS") to provide a purportedly independent LE of the life insured. To determine the LE, the medical evaluator purportedly assessed the life insured's medical records, using actuarial methods and medical evaluation independent of influence by the settlement provider. Peachtree declared the LE to the CCI by providing to Syndicate 102 the endorsement and bordereaux by which each LE was incorporated into, and became a term of, the CCI. *See, e.g.*, CCI Endorsements (RA:44-48). Peachtree declared all LEs after the Syndicate 102 Underwriters signed the CCI. *Id.*

If the life insured was still alive two years beyond the purportedly independent LE, Syndicate 102 undertook to pay the net death benefit of the life insurance policy to LRT, while ownership of the underlying policy and the necessity of paying

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[4] LRT was Peachtree's assignee for all of the life policies declared to the CCI. (RA:21, RA:50, RA:95, RA:131)

premiums to keep it in force would pass concurrently to Syndicate 102. *See id.* In the Arbitrations, Syndicate 102 alleges, *inter alia*, that LRT and Peachtree conspired with the purportedly independent medical evaluators to create artificially shortened LEs, to defraud Syndicate 102. (RA:184-95, RA:196-206, RA:4-19)

B. The Arbitration Agreement.

LRT, Peachtree, and Syndicate 102 are all parties to the CCI, which contains the Arbitration Agreement. (A:603) All four tranches of the CCI contain the same arbitration clause. As the Motion Court noted at oral argument, the arbitrators' grant of authority is in Paragraph 1. (A:738) Indeed, Paragraph 1 of the Arbitration Agreement gives the arbitrators broad authority to decide "all disputes" in accordance with the American Arbitration Association ("AAA") Rules:

> 1. All disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the American Arbitration Association Rules.

(RA:42, RA:71, RA:116, RA:152) (emphasis added). Article 15.1 of the AAA's International Dispute Resolution Procedures ("IDRP")[5] provides:

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[5] The AAA's IDRP govern arbitrations involving parties from different countries. *See* IDRP Article 1a (A:704).

> The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

See IDRP Article 15.1 (A:708) (emphasis added). Paragraph 2 of the Arbitration Agreement specifies the experience required of the arbitrators, and also provides the method of appointment where a party fails to name an arbitrator within the specified time.

Paragraph 3 of the Arbitration Agreement gives the arbitrators "the widest discretion permitted under the law" in making orders:

> 3. The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute; provided that the parties shall each retain the right to appeal errors of law to a court of law having jurisdiction of the matters addressed herein and, each party executing this Insurance hereby consents and agrees that the state or federal courts located in New York shall have exclusive jurisdiction to hear and determine any such matters. The Arbitration

> Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

(RA:42, RA:71, RA:116, RA:152)(emphasis added).

Paragraph 4 of the Arbitration Agreement specifies the seat of arbitration, as well as the apportionment of costs of the arbitration. *Id.*

C. The Three Arbitrations.

1. The LRT Arbitration.

In September 2005, LRT commenced the LRT Arbitration to recover on the Wang claim, when Mr. Wang lived two years beyond his LE. Pet. App. at 22a. Syndicate 102's defense in the LRT Arbitration is based on a fraudulent LE that LRT and Peachtree presented to the Syndicate. (RA:184-95) In 2006, LRT asked the arbitrators to enforce the Pay First and Recourse clauses, making arguments similar to those that Peachtree made to the courts below. On October 24, 2006, the Panel issued Interim Order No. 5, which rejected LRT's Pay First and Recourse arguments and denied LRT's motion. (RA:296-98) In December 2006, the LRT Panel issued a subpoena to Peachtree, and in November 2008, the U.S. Court of Appeals for the Second Circuit held that the LRT Panel could compel documents from Peachtree by making the Subpoena returnable to one of the arbitrators at a "preliminary" conference, before the final hearing on

the merits. *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008).[6]

2. The Peachtree Arbitration.

In July 2006, Syndicate 102 commenced the Peachtree Arbitration against Peachtree. *See* Syndicate 102's July 21, 2006 Statement of Claim (RA:196-206).

3. The Omnibus Arbitration.

On March 28, 2008, Syndicate 102 commenced arbitration against both LRT and Peachtree to rescind the entire CCI based on the fraudulent LEs that Peachtree supplied for several life insureds, and to recover damages from Peachtree for its fraud. (RA:4-19) By filing the Statement of Claim against both LRT and Peachtree, Syndicate 102 included in the Omnibus Arbitration all parties to the CCI so that complete and final relief could be obtained against all players, concerning fraud in all LEs over the full course of the CCI, in one proceeding. In addition, having Peachtree and LRT in the same proceeding would stop the discovery shell games that delayed the LRT Arbitration.

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[6] In its brief on appeal to the Second Circuit, Peachtree argued that the Pay First and Recourse Clauses deprived the LRT Arbitration Panel of the authority to permit discovery and to issue the Subpoena. In September 2008, Peachtree withdrew the Pay First and Recourse Clauses as grounds for that appeal. As the Second Circuit noted, the LRT Arbitration Panel had previously denied LRT's Pay First motion. *See LRT*, 549 F.3d at 213, n.3.

The Arbitration Agreement required the parties to name arbitrators by April 14, 2008. Syndicate 102 timely nominated an arbitrator, but LRT and Peachtree missed their deadline. On April 15, Syndicate 102 formally asked the AAA to name an arbitrator for LRT and Peachtree, or in the alternative to appoint all three members of the Panel. (RA:311-13) Two days later, LRT filed the federal action to stay the Arbitrations, which was dismissed for lack of subject matter jurisdiction, and LRT filed the instant action on April 24, 2008. (A:571)

D. The State Court Action.

1. The Procedural History.

In April 2008, LRT commenced this action against Syndicate 102 in New York State Supreme Court, New York County (the "Motion Court") and filed a motion to preliminarily and permanently enjoin arbitrations, by Order to Show Cause on April 25, 2008. (A:28-55, A:282-84)

On April 30, 2008, Syndicate 102 filed a motion to join Peachtree as a party after LRT refused to voluntarily add its agent, Peachtree, to the proceeding. (A:308) On May 2, 2008, LRT served a Supplemental Summons and Amended Complaint, adding Peachtree as a party to the action, but making no allegations against Peachtree and seeking no relief from Peachtree. (A:331-59) Peachtree aligned itself with LRT and sought to stay the arbitrations.

As a result of the briefing schedule, Peachtree filed its response to LRT's motion on the same day as Syndicate 102, thereby ensuring that Syndicate 102 would be unable to respond to Peachtree's argument or purported evidence. At that time, Peachtree did not submit any contemporaneous documents with its motion, but instead submitted an after-the-fact affidavit by Peachtree's CEO, James Terlizzi. (A:565-66) (LRT did not submit any such evidence to support its motion.)

2. The Motion Court Decision.

The Motion Court held that the plain and expansive language of "the Arbitration Agreement unequivocally establishes that the parties agreed to arbitrate their disputes arising out of the CCI" and empowers the arbitrators to decide the "existence, scope or validity" of the Arbitration Agreement:

> Where, as here, the parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, that incorporation constitutes clear and unmistakable evidence that arbitrability is to be decided by the arbitrators (*Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 [2d Cir. 2005]).

Pet. App. at 24a. (emphasis added). Moreover, the Court rejected Petitioner's *Hall Street* arguments,

stating that *Hall Street* did not mandate "the invalidation of the parties' agreement to arbitrate." Pet. App. at 26a.

3. The Intermediate Appellate Court Decision.

LRT and Peachtree appealed the Motion Court's decision to the New York Appellate Division. The Appellate Division affirmed the decision:

> Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that "[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement," and employs language referring "all disputes" to arbitration, courts will "leave the question of arbitrability to the arbitrators".

Pet. App. at 4a (internal citation omitted). One judge issued a separate concurrence. *Id.* at 6a-16a.

4. The Decision.

The New York Appellate Division granted LRT and Peachtree the right to appeal the

court's unanimous affirmance to the New York Court of Appeals. The Court of Appeals decided that the case did not warrant full briefing or oral argument. Pet. App. at 2a. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 500.11. Instead, the Court of Appeals reviewed the briefing submitted to the Appellate Division, along with supplemental letter briefs submitted by the parties. After this review, the Court of Appeals unanimously affirmed the Appellate Division's decision.

> [C]lear and unmistakable evidence exists in this case that the parties agreed to arbitrate questions of arbitrability, including whether the parties' arbitration agreement is invalid under *Hall St. Assoc.* or whether the apparently offending provision could be severed from the remainder of the agreement.

Pet. App. at 2a. Peachtree filed a motion to reargue, but the Court of Appeals unanimously denied that motion. *Id.* at 29a-30a. Peachtree now seeks a Writ of Certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. THE DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT AND FEDERAL LAW.

A. The Parties Clearly and Unmistakably Agreed that the Arbitrators will Decide the

"Existence, Scope or Validity of the Arbitration Agreement."

Peachtree argues that because it "challenged the validity and enforceability" of the Arbitration Agreement, "the FAA and this Court's precedents command judicial determination of Peachtree's challenge." Pet. at 19-20. In support of this contention, Peachtree relies on this Court's decisions in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) and *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S.Ct. 2847 (2010). Pet. at 19-20, 22. However, the Decision is consistent with this Court's precedent, including the recent decisions in *Rent-A-Center* and *Granite Rock*.

Contrary to Peachtree's assertions, *Prima Paint* does not support the argument that that only courts decide questions regarding the making of arbitration agreements. Pet. at 9, 19-20. Rather, *Prima Paint* was clear that it was placing a limitation on the court's authority. *See Prima Paint*, 388 U.S. at 404 ("We hold, therefore, that . . . a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.").[7] Subsequent to *Prima Paint*, this Court

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[7] Peachtree notes that the arbitration provision at issue in *Prima Paint* referred to the AAA Rules (Pet. at 20 n.13), but Peachtree fails to advise the Court that the AAA rules at issue in that 1967 decision did not include a provision giving the arbitrators the authority to rule on questions regarding the "existence, scope or validity" of the arbitration agreement. *See* Am. Arb. Ass'n., *Commercial Arbitration Rules* (1964),

has held that the parties can agree to arbitrate the arbitrability issue, *i.e.*, the existence, scope and validity of an arbitration agreement.

Section 2 of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (Pet. App. at 31a). Subsequent to *Prima Paint*, this Court has stated that Section 2 of the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). Consistent with this principle, where the "parties clearly and unmistakably" so agree, the arbitrators decide "'gateway' questions of 'arbitrability'". *See Rent-A-Center*, 130 S.Ct. at 2777; *AT&T Techs, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the

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reprinted in A Dictionary of Arbitration and its Terms, at 289-293 (Katherine Seide ed., Am. Arb. Ass'n 1970).

parties agreed to arbitrate is to be decided by the court, not the arbitrator.") In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court explained the basis for this rule.

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter.

Id. at 943 (emphasis in original, citations omitted). If there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability, then the court enforces that agreement. *See id.* at 944. Subsequently, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), the Court explained that whether the parties are bound by a given arbitration clause, and whether a binding arbitration clause applies to a particular type of controversy, are questions of arbitrability.

Here, the New York Court of Appeals faithfully applied this Court's precedents and enforced the parties' clear and unmistakable agreement that the arbitrators decide the "existence, scope or validity of the arbitration agreement."[8] In

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[8] Peachtree asserts that the courts below confused the question of the validity of the arbitration agreement with the issue of arbitrability. Pet. at 9 n.9. In support of this assertion, Peachtree ignores this Court's precedent. In

Howsam, 537 U.S. at 83, this Court stated that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' . . . ."

Further, Peachtree misplaces its reliance on *Cap Gemini II*, and fails to apprise this Court of the Second Circuit's subsequent decision (in *Cap Gemini IV*) that squarely supports Syndicate 102's position. *Cap Gemini Ernst & Young U.S., LLC v. Nackel*, 346 F.3d 360 (2d Cir. 2003) ("*Cap Gemini II*"). In *Cap Gemini II*, the Second Circuit considered whether the district court's November 2002 decision, *Cap Gemini Ernst & Young U.S., LLC v. Nackel*, No. 02-6872, 2002 WL 31626703, *2 (S.D.N.Y. Nov. 21, 2002) ("*Cap Gemini I*") improperly applied New York (rather than California) law when compelling arbitration. *Id.* at 361. The *Cap Gemini II* court did not reach the issue of arbitrability. *See id.* at 365-66. Rather, it remanded the case for further development of the choice-of-law question. *Id.* at 365.

On remand, the district court confirmed that New York law applied. *Cap Gemini Ernst & Young U.S., LLC v. Nackel*, No. 02-6872, 2004 WL 569554 (S.D.N.Y. Mar. 23, 2004) ("*Cap Gemini III*"). On appeal—for the second time—the Second Circuit affirmed *Cap Gemini III* and "reinstated and affirmed" *Cap Gemini I*. *See Cap Gemini Ernst & Young U.S., LLC v. Nackel*, 98 F. App'x 65, 66 (2d Cir. 2004) ("*Cap Gemini IV*"). Significantly, in *Cap Gemini I*, the district court found that the parties agreed to arbitrate arbitrability. 2002 WL 31626703, *2.

Peachtree also relies (Pet. at 10 n.9), on an outlying district court case. *See Nichols v. Washington Mutual Bank*, No. 07-cv-3216, 2007 WL 4198252 (E.D.N.Y. Nov. 21, 2007). But this case is flawed. In *Nichols*, the court recognized that there is a distinction between challenges to the validity of an agreement and challenges to the validity of the arbitration clause. "Nichols's challenges are to the existence and validity of the arbitration clause, . . . [the court] must decide them." *Id.* In so deciding, the *Nichols* court ignored this Court's precedent.

fact, in deciding this case, the New York Court of Appeals relied on its prior decision in *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 46 (N.Y. 1997), where the court held that the parties could, and did, agree to arbitrate arbitrability. In reaching its conclusion in *Sacharow*, the Court of Appeals cited to this Court's decisions in *AT&T* and *First Options* for the proposition that the parties can agree, through clear and unmistakable evidence, to arbitrate arbitrability. *Sacharow*, 91 N.Y.2d at 46.

B. The Decision is Consistent with this Court's Precedent.

Peachtree argues that the Court of Appeals' decision is inconsistent with this Court's recent decisions in *Rent-A-Center* and *Granite Rock*. Pet. at 12, 15-16. However, neither case changed the rule that where the parties clearly and unmistakably agree, the arbitrators decide the "existence, scope or validity of the arbitration agreement." In fact, *Rent-A-Center* and *Granite Rock* actually support the Decision.

1. Like the Unsuccessful Respondent in *Rent-A-Center*, Peachtree Has Not Challenged the Delegation Provision.

In a glaring omission, Peachtree fails to mention that in *Rent-A-Center*, this Court enforced a delegation provision in an arbitration agreement, and held that the respondent's challenge to the validity of the arbitration agreement was for the arbitrator, not the courts. *Rent-A-Center*, 130 S.Ct.

at 2779. Like the delegation provision at issue here, the "delegation provision" at issue in *Rent-A-Center* provided that the "Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability or formation of this Agreement including, but not limited to any claim that all or any part of Agreement is void or voidable." *Id.* at 2775.

In *Rent-A-Center*, this Court again stated the long-standing rule that parties may agree to arbitrate threshold or gateway questions, such as the existence or scope of the arbitration agreement:

> The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.

Id. at 2777 (emphasis added). The Court noted that such a delegation provision is simply an additional, antecedent arbitration agreement:

> An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce,

> and the FAA operates on this additional arbitration agreement just as it does on any other.

Id. at 2777-78. The question before the Court, therefore, was "whether the delegation provision is valid under § 2" of the FAA. *Id.* at 2778.

The written agreement at issue in *Rent-A-Center*, therefore, was the delegation provision, and the remainder of the contract was itself an arbitration agreement:

> Here, the "written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, that Rent-A-Center asks us to enforce is the delegation provision—the provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement,". . . . The "remainder of the contract," . . . is the rest of the agreement to arbitrate claims arising out of Jackson's employment with Rent-A-Center.

Id. at 2779 (citations omitted, emphasis added). The Court, therefore, recognized that *Rent-A-Center* differs from *Prima Paint*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) and *Preston v. Ferrer*, 552 U.S. 346 (2008), in that the arbitration provisions sought to be enforced in those cases existed in contracts unrelated to arbitration (*e.g.*,

contracts for consulting services in *Prima Paint*, check-cashing services in *Buckeye*, and talent agent services in *Preston*). In *Rent-A-Center*, "the underlying contract is itself an arbitration agreement." *Rent-A Center*, 130 S.Ct. at 2779; *see also id.* at 2775 (defining the "Agreement" as the Mutual Agreement to Arbitrate Claims).

Accordingly, the Court noted that unless the respondent had challenged the delegation provision specifically (as opposed to the arbitration agreement as a whole), the Court must treat the delegation provision as valid and require the parties to arbitrate the validity of the agreement. *Id.* Like Peachtree here, the respondent in *Rent-A-Center* challenged the validity of the arbitration agreement as a whole, not the delegation provision, in the motion court. *Id.* Moreover, the respondent in *Rent-A-Center* did not challenge the delegation provision on its appeal to the Ninth Circuit. *Id.* at 2780. The Court thus recognized that appellant had "noted the existence of the delegation provision," but had not challenged the validity of that delegation provision in particular. *Id.* at 2780.

The Court, therefore, refused to consider respondent's after-the-fact challenge to the delegation provision:

> In his brief to this Court, Jackson made the contention, not mentioned below, that the delegation provision itself is substantively unconscionable because the quid pro quo he was

> supposed to receive for it—that "in exchange for initially allowing an arbitrator to decide certain gateway questions," he would receive "plenary post-arbitration judicial review"—was eliminated by the Court's subsequent holding in *Hall Street* that the nonplenary grounds for judicial review in § 10 of the FAA are exclusive. He brought this challenge to the delegation provision too late, and we will not consider it.

Id. at 2781 (citations and footnote omitted);

Realizing that *Rent-A Center* requires a challenge specifically to the delegation provision, in the Petition, Peachtree suggests that it is challenging the delegation provision on a basis similar to the respondent in *Rent-A-Center*. Pet. at 17 n.12. This is the first time Peachtree has made such a challenge.

Like the respondent in *Rent-A-Center*, Peachtree did not challenge the delegation provision before the Motion Court. Before the Appellate Division, Peachtree noted the existence of the delegation provision (Peachtree's Dec. 8, 2008 Br. to the Appellate Division at 16), but did not challenge the delegation provision. Instead, Peachtree challenged "the entire Arbitration Agreement." *See* Peachtree App. Div. Br. at 4 (alleging that "the entire Arbitration Agreement has been rendered

invalid and unenforceable"); 27 (arguing that the Court should "strike the entire Arbitration Agreement contained in the CCI Contracts as invalid and unenforceable"); 29 (alleging that "the entire Arbitration Agreement must be invalidated.") Peachtree did not even challenge the delegation provision on its appeal to the Court of Appeals. Indeed, Peachtree's June 25, 2010 letter advising the Court of Appeals of the Court's decision in *Rent-A Center* refers to Peachtree's challenge to the "arbitration agreement that is contained" in the CCI, and not to the delegation provision in that arbitration agreement.

Further, in its Petition, Peachtree is not challenging the delegation provision. Pet. at 7 ("Peachtree claims that the arbitration provision in the [CCI] was rendered invalid and unenforceable . . . ."). In *Rent-A-Center*, the respondent finally got around to challenging the delegation provision on its appeal to this Court, but that challenge was "too late". *Rent-A-Center*, 130 S.Ct. at 2781. Similarly, if Peachtree ever gets around to challenging the delegation provision, that challenge is "too late." *Id.*

2. *Granite Rock* Confirms that the Parties Can Agree to Arbitrate Enforceability and Scope

The Court's recent decision in *Granite Rock* also supports the Decision. In *Granite Rock*, the relevant question before the Court was whether the District Court or an arbitrator should resolve a dispute over the date of ratification of a collective bargaining agreement. *See Granite Rock*, 130 S.Ct.

at 2853. The union claimed that the arbitrator should decide the issue; the company claimed the formation date question was for the District Court. The parties did not dispute that the District Court was the proper forum to determine the arbitrability of the ratification date dispute, *i.e.*, there was no question about whether the arbitrators should decide arbitrability. *Id.* at 2856.

Throughout its opinion, the Court reiterated that parties have the power to refer the existence or scope of an arbitration agreement to the arbitrators.

> [O]ur precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue.
>
> * * *
>
> We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular

> dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.

Id. at 2857-58, 2859-60 (internal citations omitted, italics in original, underline added). Based upon the foregoing framework, and in the absence of a provision specifically referring such dispute to the arbitrators, the Court held that the ratification date dispute went to the formation of the agreement, and thus, had to be determined by the District Court. *Id.* at 2860.

The Decision is consistent with this Court's precedent. The Arbitration Agreement and incorporated AAA Rules clearly and validly establish that the parties committed the "existence, scope or validity of the arbitration agreement" to the arbitrators. Under these facts, *Granite Rock* supports the Court of Appeals' recognition of a "valid provision specifically committing such disputes to an arbitrator." *Id.* at 2857-58.

C. The Decision Follows This Court's Precedent in Holding that the Parties Clearly and Unmistakably Agreed to Arbitrate the Existence, Scope and Validity of the Arbitration Agreement.

Peachtree also asserts that "there is absolutely no provision in the CCI . . . submitting to arbitration the thresholds questions" of the existence, scope or validity of the Arbitration Agreement, and so it did not agree to arbitrate the "validity" of the Arbitration Agreement. Pet. at 17, 20-21. This assertion is contrary to the terms of the Arbitration Agreement, and the rules which are incorporated therein by specific reference. As noted above, the first paragraph of the Arbitration Agreement requires industry arbitration under AAA rules. (RA:42, RA:71, RA:116, RA:152). By incorporating the AAA rules, the parties agreed that the arbitrators, not a court, would decide the "existence, scope or validity" of the Arbitration Agreement. Article 15.1 of the AAA's International Dispute Resolution Procedures ("IDRP") provides as follows:

> The tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement.

See IDRP Article 15.1 (A:708) (emphasis added). As the New York courts correctly held, consistent with

this Court's precedent, the parties' agreement to refer "all disputes" to arbitration in accordance with the AAA rules provides clear and unmistakable evidence that the parties agreed to arbitrate Peachtree's challenge to the existence, scope or validity of the Arbitration Agreement.

This Court has looked to incorporated rules to determine the parties' intent with respect to arbitrability. In *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court determined that the FAA superseded a California statute that referred certain disputes initially to an administrative agency. *Id.* at 349, 359. One of the respondent's arguments in support of the application of state law was that the contract contained a California choice-of-law clause, and that therefore, California law should apply. *Id.* at 360. In rejecting that argument, the Court noted that the contract provided for arbitration in accordance with the AAA Rules, and these rules provided the arbitrator with the "power to determine the existence or validity of a contract of which an arbitration clause forms a part." *Id.* at 361-62. The Court specifically stated that "The incorporation of the AAA rules, and in particular Rule 7(b), weighs against inferring from the choice of law clause an understanding shared by [the parties] that their dispute would be heard, in the first instance" pursuant to the California statute at issue. *Id.* at 362 (emphasis added).

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court also looked to incorporated rules to determine the parties intent as to whether the arbitration panel had the

authority to award punitive damages. *Id.* at 54. In deciding that the arbitrators had the authority to award punitive damages, the Court noted that the agreement provided that all controversies would be settled by arbitration in accordance with the NASD or NYSE rules. *Id.* at 58-59. The NASD rules provided that the arbitrators could award "damages and other relief." *Id.* at 60-61. The Court stated that this provision was "broad enough at least to contemplate" punitive damages and contradicted the argument that the parties agreed to foreclose claims for those damages. *Id.*

Consistent with *Mastrobuono* and *Preston*, other courts have looked to incorporated arbitral rules to determine if the parties agreed to arbitrate arbitrability. *See Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 211 (2d Cir. 2005); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 46 (N.Y. 1997).

In *Contec*, the Second Circuit considered an arbitration agreement that referred "any controversy" to arbitration in accordance with the AAA Rules.[9] Noting that the AAA rules explicitly authorized the arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the

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[9] In *Contec*, the court considered Rule 7 of the AAA Commercial Arbitration Rules, which provides that the arbitrator shall have the "power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Contec*, 398 F.3d at 208. Here, the applicable AAA international rule is identical. *See* IDRP Article 15.1 (A:708).

arbitration agreement," the court held that as a result of the "any" dispute language and incorporation of the AAA rules, arbitrability was for the arbitrators, not the court. *Id.* at 211; *see also Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124-25 (2d Cir. 2003) (ordering arbitration of arbitrability because of the "all disputes" language and incorporation of rules, in this case of the ICC, that place arbitrability in the arbitrators' purview).

Similarly, in *Sacharow*, the New York Court of Appeals referred arbitrability to the arbitrators where the agreement employed "any" controversy language and incorporated rules that required arbitrability to be decided in arbitration. *See Sacharow*, 91 N.Y.2d at 46-47. In *Sacharow*, the Court of Appeals first noted that "the words 'any and all' are elastic enough to encompass disputes over whether . . . a claim is within the scope of arbitration." *Id.* at 46. Moreover, the court found that an NASD rule—which "empowered [the arbitrators] to interpret and determine the applicability of all provisions under this Code"—was broad enough to meet the clear and unmistakable evidence threshold. *Id.* at 46-47.

Here, the New York courts held that the incorporation of the AAA Rules, including the delegation provision, into the Arbitration Agreement constituted clear and unmistakable evidence that the parties agreed to arbitrate the existence, scope and validity of the arbitration agreement. This decision follows this Court's precedent.

II. HALL STREET HAS NOT RENDERED THE ARBITRATION AGREEMENT A NULLITY.

As set forth above, the New York Court of Appeals' decision that the arbitrators decide Peachtree's challenge to the existence, scope and validity of the Arbitration Agreement, including the determination of the severability argument[10], is consistent with this Court's precedent. *See supra* Section I. However, even if the Court were to consider the substance of Peachtree's challenge to the Arbitration Agreement, it would find that there is no merit to Peachtree's contentions. Thus, there is an independent basis for affirming the Decision.

In challenging the Arbitration Agreement, Peachtree misconstrues the *Hall Street* decision. Pet. at 23. *Hall Street* does not limit what disputes the parties can agree to arbitrate. *Hall Street* merely says that parties cannot contractually expand the scope of judicial review of arbitral awards to include "errors of law," as the FAA provides the exclusive grounds for vacatur of an arbitration award. *See Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008). Thus, Peachtree still has several different grounds for judicial review of arbitration awards by the express provisions of the FAA. *See id*; 9 U.S.C. §§ 10 & 11.

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[10] Contrary to Peachtree's argument that the courts below did not address severability (Pet. at 11), the parties fully briefed the severability issue, and after consideration of that briefing, the courts decided that this was an issue for the arbitrators to decide. Pet. App. at 2a, 5a.

In fact, in declining to expand the scope of judicial review to include "errors of law," *Hall Street* is consistent with the law as determined by some courts at the time the parties entered into the Arbitration Agreement. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) (holding that "parties may not contract for expanded judicial review" of an arbitrators decision); *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-998 (8th Cir. 1998) ("we do not believe it is yet a foregone conclusion that parties may effectively agree to compel a federal court to case aside sections 9, 10 and 11 of the FAA"); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (the parties "cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract.").

Parties are free to relinquish their rights to litigate disputes by agreeing to arbitration. *See Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758, 1774 (2010) ("an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."). In any event, under state law (which would govern the question), the "errors of law" provision of Paragraph 3 is severable from the remainder of the Arbitration Agreement. *See, e.g., Caruso v. Allnet Commc'n Servs., Inc.*, 662 N.Y.S.2d 468, 469 (N.Y. App. Div. 1997) ("Rather than consider the illegal contract as void *in toto*, the *better view is to sever the offending provision and validate the basic agreement . . .*") (emphasis added); *BDO Seidman v. Hirshberg*, 690 N.Y.S.2d 854, 860 (N.Y. 1999) (severing offending portion of employment

covenant and recognizing "judicial power to sever and grant partial enforcement" of agreements). In fact, the Ninth Circuit had severed the offending provision in *Hall Street*. *See Hall Street Assocs., LLC v. Mattel Inc.*, 113 F. App'x 272, 273 (9th Cir. 2004), *rev'd on other grounds*, 552 U.S. 576 (2008) (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003)). The severability decision was not before this Court for review in *Hall Street*. *See Hall St.*, 552 U.S. at 587 n.6.

Moreover, Peachtree has failed to provide contemporaneous evidence that the "errors of law" provision was a deal breaker for the entire Arbitration Agreement. Instead, taking advantage of the initial alignment of the parties in this matter, on the same day that Syndicate 102's brief was due in the Motion Court, Peachtree filed a single affidavit suggesting, after the fact, that the Arbitration Agreement would not have been entered into but for the inclusion of the "errors of law" provision.

Peachtree—which was LRT's admitted "agent" (RA:178), creator, Servicer, and Originator—filed its papers in the Motion Court in support of LRT's request for a stay on the same day that Syndicate 102 filed its papers in opposition. Petitioner disingenuously, and desperately, refer to Peachtree's affidavit as "unrebutted," when Peachtree is well aware that the briefing schedule on LRT's Order to Show Cause did not permit Respondent to file a rebuttal affidavit. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g) Rule 19.

As the Motion Court noted at the hearing on the motion, it is "very easy" for Peachtree's affiant to note "after the fact" that he would not have entered into the arbitration agreement but for the inclusion of the "errors of law" provision. (A:746). "It's far more significant and probative when it's said during the negotiations." *Id. See also Stage Club Corp. v. West Realty Co.*, 622 N.Y.S.2d 948, 951 (N.Y. App. Div. 1995) ("a question of credibility is raised" by an affidavit prepared after the fact without contemporaneous supporting evidence).

III. THE PETITION DOES NOT RAISE A QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The "Pay First" Issue Is Moot.

As Peachtree acknowledges (Pet. at 4, n.4), LRT and Syndicate 102 have reached a settlement pursuant to which, *inter alia*, all of Syndicate 102's obligations under the CCI have been extinguished. Because of the settlement, Peachtree's argument concerning any alleged conditions precedent (*i.e.*, the "Pay First" clause in the CCI) is now moot.

B. Peachtree's Pay First Argument Has Been Rejected.

Further, Peachtree's arguments concerning alleged conditions precedent are based on a strained, incorrect reading of the CCI, as evidenced

by the fact that those arguments have now been considered and *rejected* by the LRT Arbitration Panel, and state and federal courts. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 213 n.3 (2d Cir. 2008) (noting that the LRT Arbitration Panel had denied LRT's "request to enforce the CCI policy's 'pay first' provision").

C. The Arbitrators Decide the "Pay First" Issue.

Peachtree's "Pay First" argument goes to the "scope" of the Arbitration Agreement, which, as set forth above, Peachtree specifically agreed to arbitrate under the CCI. *See supra* Section I. Moreover, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court was clear that arbitrators decide arguments regarding "procedural questions" concerning prerequisites to arbitration:

> Thus procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide. . . . So, too, the presumption is that the arbitrator should decide allegation[s] of waiver, delay, or a like defense to arbitrability. . . . Indeed, the Revised Uniform Arbitration Act of 2000 (RUAA), seeking to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal

> Arbitration Act]," states that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." RUAA § 6(c), and comment 2, 7 U.L.A. 12-13 (Supp. 2002). And the comments add that "in the absence of an agreement to the contrary, issues of substantive arbitrability...are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.*,§ 6, comment 2, 7 U.L.A., at 13 (emphasis added).

See Howsam, 537 U.S. at 84-85 (italics in original; underline added) (selected internal citations omitted).

Peachtree argues that *Howsam* does not apply here because the parties agreed that a court would decide the issue, by using the phrase "under no circumstances" in the Pay First clause. Pet. at 27 n.14. However, Peachtree' misconstrues the phrase "under no circumstances"; that phrase says nothing about who will decide the Pay First issue.

Peachtree also implies that *Howsam* no longer applies because the Court's subsequent

decision in *Hall Street* stands for the proposition that the parties cannot agree to arbitrate under terms that are inconsistent with the FAA, and that allowing the arbitrator to decide whether there has been compliance with a condition precedent is at odds with the FAA. Pet. at 28 n.14. This argument is based upon an incorrect reading of *Hall Street*, which does not limit the parties' ability to refer issues to arbitration, but instead stands for the proposition that the parties cannot expand the scope of judicial review.

Peachtree also argues that *Howsam* does not apply because the "Pay First" issue is not of a "procedural nature, as it does not grow out of the dispute and bear on its final disposition."[11] Pet. at 27 n.14. In asserting this argument, Peachtree quotes from this Court's opinion in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). What Peachtree does not advise the Court is that in the relevant portion of *John Wiley*, an employer sought to bar arbitration because it claimed that the union had not complied with required pre-arbitration grievance steps. *Id.* at 555-56. The Court determined that the question of whether there had been compliance with the required pre-arbitration

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[11] In connection with this argument, Peachtree cites to *County of Rockland v. Primiano Const. Co., Inc.*, 431 N.Y.S.2d 478 (1980). *County of Rockland* is distinguishable because it (1) predates *Sacharow*; and (2) does not consider whether the parties' broad arbitration clause and incorporation of rules conferring the power to determine "existence, scope or validity" on the arbitrator confers the authority to determine arbitrability on the arbitrators.

grievance procedure was for the arbitrator. *Id.* at 557.

In support of its argument that the Court should grant certiorari, Peachtree argues that there is a split among the Federal Circuit Courts of Appeals on this issue. Pet. at 26. Peachtree cites to *Perdue Farms, Inc. v Design Build Contracting Corp.*, 263 F. App'x 380 (4th Cir. 2008), *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) and *Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287 (11th Cir. 2002). In none of those cases did the court determine who decides whether a condition precedent has been satisfied.[12] In fact, in all three cases, the parties submitted the questions to the court to decide. Thus, those cases are distinguishable from the present case, where the parties agreed that the arbitrators would decide this issue.

In contrast, as Peachtree notes (Pet. at 26-27), in *3M v. Amtex*, 542 F.3d 1193, 1200 (8th Cir. 2008), the court determined that the arbitrators must decide if the condition precedent was satisfied. In deciding *3M*, the Eight Circuit relied upon its prior decision reaching the same conclusion in *International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Ironworkers v. EFCO Corp.*, 359 F.3d 954 (8th Cir. 2004). In turn in

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[12] The issue was also not discussed in the corresponding district court opinions. *See Perdue Farms, Inc. v. Design Build Contracting Corp.*, No. 3:06CV245, 2007 WL 87667 (W.D.N.C. Jan. 9, 2007); *HIM Portland, LLC v. Devito Builders, Inc.*, 211 F. Supp. 2d 230 (D. Maine 2002); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, No. 8:01-cv-926, slip op. (M.D. Fla. Oct. 8, 2001)

EFCO, the court relied upon this Court's decision in *Howsam* to determine that arbitrators decide whether prerequisites to arbitration have been satisfied.

In light of the fact that the allegedly conflicting decisions did not actually address the issue in this case, there is no split among the Circuits. The Petition should not be granted.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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